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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 1

THE TEXAS & PACIFIC RAILWAY COMPANY ET AL., appellants

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION ET AL., appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS

ON REARGUMENT

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS

The opinion of the specially constituted District Court (R. 3571) is reported in 42 F. (2d) 281.

The first report of the Commission (R. 3346) is reported in 100 I. C. C. 110. The report of the Commission on further hearing (R. 3367) is re-

ported in 128 I. C. C. 349. The second report of the Commission on further hearing (R. 3438) is reported in 160 I. C. C. 345.

QUESTIONS

On export, import, and coastwise traffic moving through the Gulf ports from and to interior territory, much nearer [1] Galveston and other Texas ports than the port of New Orleans, the rates of appellant carriers and other carriers to and from New Orleans were generally the same as, and in many instances (R. 3359, 3444) even lower than, the rates to and from the Texas ports. In respect of certain commodities, the Commission, upon findings of undue preference of New Orleans and undue prejudice to Galveston and other Texas ports, entered orders, which, while permitting equalized rates where the distance to New Orleans did not exceed that to Galveston by more than 25 per cent, prescribed differentials in the New Orleans rates over the Texas ports' rates from and to interior points involving differences in distance exceeding that percentage. The ultimate question is whether the lower court erred in upholding the validity of the orders. Subordinate questions bearing on the validity of the orders are:

1. Whether said ports occupied a relation to said traffic and to the rates condemned such that

[1] Average differences in distance from representative interior points in northern Texas, 200 miles, in Oklahoma 146 miles, and in Southern Kansas 143 miles. (R. 3376, 3377.)

they could be regarded as localities, the port of New Orleans unduly preferred and the Texas ports unduly prejudiced, within the meaning of sections 3 (1) and 15 (1) of the Act?

2. Whether the Commission's orders, which in no way disturb New Orleans' advantage of lower rates from territory nearer to it than Galveston (R. 3354, 3389), which leave it with equal rates from a zone extending up to 25 per cent nearer Galveston, and which, from territory still nearer Galveston, prescribe differentials in the New Orleans rates over those to Galveston that only moderately [2] reflect the greater amount of transportation to New Orleans, are invalid as an attempt to take from New Orleans its natural and commercial advantages under the guise of regulating charges for transportation?

3. Whether said orders which, in the interest of those railroads whose long hauls are in the New Orleans routes, permit of the maintenance of rates the same to New Orleans as to Galveston from territory up to 25 per cent nearer Galveston and moderate differentials from territory still nearer Galveston, thus recognizing that carrier competition may within limits justify disregard of a port's natural advantage of proximity to tributary terri-

[2] The differentials prescribed following the first hearing were small as compared with the differences in domestic rates to the respective ports from the same origins. Following the second hearing the differentials on principal commodities were made even less.

tory, are, nevertheless, invalid because carrier competition was not regarded as justification in law for unrestricted equalization of rail rates to the respective ports?

4. Whether the Commission's orders are invalid for lack of substantial evidence?

5. Whether appellant carriers, which reach the port of New Orleans with their own rails but reach the Texas ports only over the rails of connecting carriers as participants in through routes and joint rates, could in law be guilty of preferring the former port to the prejudice of the latter ports?

6. Whether said orders, which fix the relationship as between rates to New Orleans and those to the Texas ports, are orders requiring the establishment of through routes that "short haul" appellant railroads in contravention of section 15 (4) of the Act?

7. Whether the orders are void for arbitrariness because certain orders, granting relief from the long-and-short-haul clause of section 4 of the Act, permit of greater differences in distance than 25 per cent in authorizing circuitous lines to meet the rates of short-distance lines between the same origins and destinations?

8. Whether the orders are invalid as contravening the constitutional prohibition that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another"?

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Appendix.

STATEMENT

PROCEEDINGS BEFORE THE COMMISSION

This controversy, as initiated before the Commission, involved commodity carload rates between the Gulf ports and points in western classification territory and Illinois on traffic in export, import, or coastwise movement. The complaint, which was filed with the Commission by the Galveston Commercial Association, alleged that the Galveston rates were unreasonable and that the relationship of said rates to the rates of Houston, Texas City, Beaumont, Port Arthur, and Orange, Tex., Mobile, Ala., New Orleans, La., and its subports was unduly prejudicial to Galveston and unduly preferential of the other ports mentioned. At the hearing the allegations of unreasonableness in the Galveston rates and of undue preference of the other Texas ports [2] in their rate relationship to Galveston were withdrawn. The other Texas ports intervened and asked for the same relief that might be accorded to Galveston in its rate relationship with New Orleans and Mobile. The issue as heard,

[2] Houston is 48 miles north of Galveston, and Texas City, Beaumont, Port Arthur, and Orange, Tex., are 10, 76, 96, and 98 miles, respectively, east of Galveston. On the other hand, New Orleans and Mobile are 355 and 496 miles, respectively, east of Galveston. (R. 3348.)

therefore, was one of prejudice against Galveston and the other Texas ports and of preference of New Orleans and Mobile. (R. 3348.)

Interests at the port of New Orleans filed interventions opposing the complaint, and numerous other interventions were filed by shippers and commercial organizations, some in support of, and some in opposition to the complaint. (R. 3351.) The Atchison, Topeka & Santa Fe Ry. Co., International Great Northern Railroad Company, and the Missouri-Kansas-Texas Railroad Company of Texas (hereinafter called the Santa Fe, the I. G. N., and M.-K.-T. of Texas, respectively), whose lines serve the Southwest and reach to Galveston, support the complaint. On the other hand, certain carriers reaching New Orleans with their own lines, notably appellants, Texas & Pacific Railway Company and Louisiana Railway & Navigation System (hereinafter called the Texas & Pacific and the L. R. & N., respectively), opposed the complaint.[4] (R. 3350, 3351.)

From the points in the territory involved the distances to New Orleans were greater than to the Texas ports. But it was the practice of the carriers, generally speaking, to equalize the New Orleans rates with those to Galveston and other Texas ports taking Galveston rates. There were excep-

[4] Detailed statements of the carriers serving the respective ports and the positions taken by them in respect of the complaint, are given in the reports. (R. 3350, 3374.)

tions to this practice of equalizing rates in disregard of the shorter hauls to the Texas ports. Notably, from most of Texas the rates on cottonseed products were lower to Galveston than to New Orleans, and that was also true of rates on grain and its products from points on the Santa Fe, the Fort Worth & Denver City Railway, and the Wichita Valley Railway.[5] These latter rates were not complained of. (R. 3352.) Furthermore, while the rates to New Orleans and Galveston from territory nearer the latter were for the most part equalized, there were instances of rates even lower to New Orleans for much longer hauls. Referring to comparisons of average rates and distances to New Orleans with those to Galveston set forth in an appendix to its first report, the Commission said:

> Analysis of the comparisons in the appendix shows, for example, that for a difference in average distance of 278 miles in favor of Galveston the average rate to ship side on sacked grain and flour from points in Texas on the Texas & Pacific, the Gulf, Texas & Western, the Kansas City,

[5]About 60 per cent of the export grain passing through Galveston comes from points on the Santa Fe and other carriers from which rates are lower to Galveston than to New Orleans, leaving 40 per cent to come from points on the lines of carriers in southwestern territory from which the rates to Galveston and New Orleans are equalized. (R. 3352.) Other instances of rates recognizing the shorter haul to Galveston are given in the first report. (R. 3351.)

Mexico & Orient, the Roscoe, Snyder & Pacific, and the Abilene & Southern is 1.1 cents less to New Orleans than to Galveston. From Oklahoma for an average difference in distance of 189 miles the rate to New Orleans is 0.5 cent on flour and 1 cent on grain less to Galveston than to New Orleans. On cottonseed cake and meal from the 80 per cent group in northeastern Texas the rate to New Orleans is 1.8 cents less than to Galveston, although the average distance favors Galveston by 203 miles. From Oklahoma the average distance favors Galveston by 189 miles, and the average rate to New Orleans is 1.7 cents less than to Galveston. On bagging the rate to Little Rock, Ark., is 12 cents higher from Galveston than from New Orleans, although the distance is only 23 miles greater. To Alexandria, La., the difference in rates on bagging is 30 cents in favor of New Orleans, while the distance favors New Orleans by only 18 miles. These illustrations are typical of many others shown of record. (R. 3359.)

The general basis of the complaint was, then, that the failure of the carriers, in establishing rates to the respective ports, to give recognition to Galveston's proximity to the interior points involved, subjected Galveston to undue prejudice and discrimination by depriving it of the natural advantages of its geographical location. And complainant contrasted this situation with the fact that from territory nearer New Orleans the lesser serv-

ice was given recognition by lower rates to New Orleans than to Galveston. (R. 3354.) Complainant did not take the position that every discrimination by way of equalized rates for unequal amounts of transportation would constitute undue preference and prejudice, but it insisted that there were limits beyond which the failure to accord rate recognition to differences in length of hauls must bring about that result within the meaning of the prohibition of section 3 against the causing of any undue preference or prejudice "in any respect whatsoever." Its suggestion in a general way was "that a differential between the two ports should be accorded for differences in distance in excess of 25 per cent." (R. 3352.)*

While the complaint was against all commodity carload rates between the Gulf ports and points in Western Classification territory and Illinois on traffic in export, import, or coastwise movement, as restricted by the evidence at the hearings, the issues were confined to rates on some 14 commodities or commodity descriptions, and for movements only from or to points in southern Kansas, Okla-

* Complainant further asked that, if its prayer for differentials in favor of Galveston be denied from territory west of the Mississippi River, the present difference in rates in favor of New Orleans from Territory east of the river be discontinued. It preferred, however, to have the situation corrected by a reduction in the rates to Galveston from the southwest rather than by an equalization of rates to the two ports from territory each of the river. (R. 3354.)

homa, Texas, Arkansas, and southwestern Louisiana. (R. 3349, 3373.)[7]

Following hearings before an examiner, the filing of briefs and rendering of oral argument, the Commission, Division 2, issued its report of June 24, 1925 (R. 3346), and order of like date. (R. 165.) Thereby the Commission found that the relationship of rates complained of in respect of certain named commodities[8] and for movements from or to points in Arkansas, Texas, Oklahoma, southern Kansas, and Louisiana west of the Mississippi, were unduly prejudicial to Galveston and unduly preferential of New Orleans. Where the distance to or from Galveston was shorter by not more than 100 miles it required only that Galveston be accorded the same rates as those enjoyed by New Orleans. For differences in distances exceeding 100 miles it prescribed certain named minimum differentials under the New Orleans rates. (R. 3361, 3362.)

Subsequently, upon application for rehearing by numerous parties to the proceeding, the Commission reopened the case for further hearing, but re-

[7] There were no points in Arkansas and only a few in southwestern Louisiana, from which the differences in distance to New Orleans over Galveston were such as to include them in so-called differential territory. (R. 3377, 3418.)

[8] Some 14 commodities, of which so far as volume of movement is concerned, the more important are grain and grain products, petroleum and petroleum products, and cottonseed and peanut cake, meal, and oil. (R. 10, 3362.)

fused to postpone the effective date of its order. The defendant railroads filed and published schedules of proposed rates to comply with the order, but upon protests of numerous parties, including the complainant in the Commission proceeding, filed pursuant to section 15 (7), the paragraph of the Act which provides for suspension and investigation of proposed new rates, the Commission suspended the proposed schedules and assigned the Investigation & Suspension proceedings thereby instituted for joint hearing with the further hearing granted in the main case. (R. 3372.)

Following further extensive hearings, at which additional evidence was introduced, briefs were filed and oral argument had, the Commission rendered its report of June 29, 1927 (R. 3367), and entered its orders of like date in each of the proceedings so consolidated for hearing as aforesaid. The report modified the Commission's previous findings in the following particulars:

> 1. It included the other Texas ports along with Galveston in the finding of undue prejudice.
>
> 2. Instead of the 100-mile basis prescribed in the original report, it permitted parity of rates where the short-line distance to New Orleans does not exceed that to Galveston by more than 25 per cent.
>
> 3. It exempted rates from or to points on the lines of the Texas & Pacific and the L. R. & N.

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4. It exempted rates on petroleum and petroleum products altogether.

5. It still further narrowed the territory in southern Kansas as to which its findings of undue prejudice in grain rates applied.

6. It reduced the amounts of the prescribed differentials on some of the principal commodities.

7. It added to the commodity rates covered by its previous findings rates on bagging, cotton-bale ties, and buckles to points in Oklahoma.

The Commission's order (R. 76) in the title case prescribed rates to or from Galveston and the other Texas ports taking the same rates, not exceeding those maintained to or from New Orleans, where the short-line distance [9] to New Orleans exceeds that to Galveston by not more than 25 per cent—that is, for such difference in distance it permitted the New Orleans rates to be the same as rates to the Texas ports. For differences in distances exceeding 25 per cent it prescribed certain named minimum differentials under the rates maintained to New Orleans.[10]

In respect to the substitution of the 25 per cent, in lieu of the 100-mile basis for differences in dis-

[9] "In determining distances to or from the respective ports of Galveston and New Orleans the shortest routes over which carload traffic can be moved without transfer of lading shall be used." (R. 3419.)

[10] The Commission entered separate orders in the Investigation and Suspension proceedings cancelling the proposed schedule of rates. (R. 85, 86.)

tance as to which rates to New Orleans were allowed to be the same as rates to the Texas ports, the report reads (R. 3414):

> New Orleans protestants contend that if differentials are to be established the 100-mile basis prescribed in the original report should not be followed. They take the position that such a difference in distance is less objectionable for the shorter distances, but that for the longer distances the mileage limit of equalized territory should be substantially greater. We believe that there is merit in this contention and that a percentage difference in distance is preferable to a fixed mileage difference for all distances.

The reason given by the Commission for exempting from its order rates from or to points on the Texas & Pacific and the L. R. & N., was that it could not hold that those carriers participated in the causing of the undue preference and prejudice because they did not have a controlling voice in the level of the rates to the Texas ports as well as in the level of rates to New Orleans. (R. 3406.) The carriers in question reach with their own lines only the Louisiana ports, but, as will hereinafter be seen, they were parties to through routes and joint rates to and from the Texas ports. (R. 3452.)

The Commission described in its report the approximate eastern boundary line of the territory

from which the prescribed differentials were to apply. (R. 3418.) Said differential territory is also shown in a map introduced at the final hearings. (R. Vol. VI, Ex. B–1.)

By schedules, filed and published by the carriers, rates carrying out the rate relationship as prescribed became effective December 12, 1927. (R. 3441.)

Thereafter upon petitions filed by complainant, by certain carriers and by various interveners, the proceeding was reopened—

> with the object of determining whether traffic from and to points on the lines of the Texas & Pacific and the Louisiana Railway & Navigation System should continue to be exempted from the finding of undue prejudice made with respect to other defendants, and also whether traffic from and to points on the Weatherford, Mineral Wells & Northwestern, Denison & Pacific Suburban, Cisco & Northeastern, Abilene & Southern, and Pecos Valley Southern, short-line connections and alleged subsidiaries of the Texas & Pacific, should not also be exempted from the finding of undue prejudice. (R. 3442.)

Contemporaneously there were heard Docket No. 20685 and fourth-section application No. 13271, the rate situations in both of which arose from the exemption of the Texas & Pacific and the L. R. & N. from the finding of undue prejudice in

the previous report. In No. 20685 complainant corporations, engaged in the business of roasting coffee at Waco, Texas, alleged that the rate on green coffee, in carloads, from New Orleans to Waco is unreasonable, unduly prejudicial to them, and unduly preferential of their competitors at Dallas and Fort Worth. By the fourth-section application authority was sought to establish rates on vegetable cakes, meal, oils, and foots, in carloads, from points in Texas on the Texas & Pacific and L. R. & N. of Texas, and on grain and grain products, in carloads, from points in Texas on the Texas & Pacific to New Orleans, without observing the long-and-short haul provision[12] of the fourth section of the Act. (R. 3442.)

Following further hearings and the presentation of argument, orally and in briefs, the Commission rendered its report of December 23, 1929 (R. 3438), and entered its orders of like date in the main case (R. 87), in said Docket No. 20685 (R. 93), and in the matter of said Fourth Section application.[13]

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[12] This provision of Section 4 forbids carriers from charging more "for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance," except after obtaining Commission authority. The authority was sought from the Commission to enable the Texas & Pacific and the L. R. & N. to equalize their rates, for example, from Dallas to New Orleans with the rates from Dallas to Houston while at the same time continuing to charge higher rates from intermediate points to New Orleans. (R. 3444, 3445.)

[13] The Fourth Section application was denied. (R. 3456.)

In its final report the Commission reversed its decision that the Texas & Pacific and L. R. & N. could not be held guilty of undue prejudice against the Texas ports as to traffic from stations on their line because they had no controlling voice in the level of the rates to the Texas ports. Accordingly, its ultimate action in the title case included traffic from stations on the Texas & Pacific and the L. R. & N. in its findings of discrimination against the Texas ports and in its order for removal thereof. The Commission also held that the shortline connections of the Texas & Pacific, above mentioned, should not be exempted from said findings and order. (R. 87, 3456.)

In No. 20685, the rates on green coffee from New Orleans to Waco were found unduly prejudicial to complainants at Waco and unduly preferential of their competitors at Dallas and Fort Worth to the extent that they exceeded rates maintained on the same commodity from New Orleans to Dallas and Fort Worth. (R. 3456.) The defendant carriers were ordered to cease and desist from charging rates to Waco exceeding the rates maintained to Dallas and Fort Worth. (R. 93.)

FOREWORD

The case was briefed and argued during the October Term, 1931. On May 30, 1932, the Court restored it to the docket for reargument upon all

questions involved, and invited the attention of counsel

> to the question whether the respective relations of the Louisiana ports and the Texas ports to the export, import, and coastwise traffic affected and to the rates condemned by the orders in controversy are such that the Louisiana ports may be regarded as localities unduly or unreasonably preferred by such rates within the sense and meaning of Sections 3 (1) and 15 (1) of the Interstate Commerce Act, and that the Texas ports may be regarded as localities unduly or unreasonably prejudiced by such rates within the sense and meaning of said sections.

This brief covers the arguments for the United States and the Commission upon the question to which the Court has directed counsels' attention, and upon all other questions involved in the case, except argument contained in Part VI of the former brief under the title heading, which reads:

> The Commission's orders fixing a rate relationship between the port of New Orleans and the Texas ports are not orders requiring the establishment of through routes which "short-haul" appellant carriers in contravention of Section 15(4) of the Act.

The argument under this heading is not reproduced in this brief because the assignment of error to which it was directed was not pressed in appel-

lants' briefs and arguments. If said assignment of error should be urged at the reargument of the case, the Court is respectfully referred to the argument presented under said Part VI of the former brief of the United States and the Commission.

SUMMARY OF ARGUMENT

1. The relations occupied by the port of New Orleans and the Texas ports to traffic in export, import, and coastwise commerce, and to the rates thereon, are such that they must be regarded as localities susceptible to the undue and unreasonable preference and prejudice prohibited by Section 3. Said ports, considered solely from the standpoint of their shipper interests, that is, of exporters, importers, dealers, and agents, doing business there as shippers, consignors, or consignees or otherwise having direct interest in the rail shipments, are entitled to the protection of Section 3. But the interests of said ports do not stop with shippers. Export, import, and coastwise traffic is of vital concern to the ports, not only in such of their industries, activities, and investments as have direct connection with the rail transportation, but also in their facilities, activities, and industries connected with the transshipment and steamship service; and while the latter are not directly related to the rail transportation, it is clear that without them there would be no traffic of said kind for the railroads to transport. Just as there is interdependence of

interests between the railroads and producers and consumers at inland localities similarly there exists interdependence of interests between the railroads and all interests at the ports devoted to the traffic. Said ports, in all of their facilities, activities, and functions as such, occupy a relation to the rail traffic in export, import, and coastwise commerce essential to its existence at the respective localities, and in those interests they are plainly susceptible to injury, if said traffic does not move on just rates.

Section 3's prohibition is against any undue or unreasonable preference of, or prejudice to, any locality in any respect whatsoever. The comprehensive word "locality," particularly as used in such a sweeping prohibition, does not permit of a construction that would cover the ports only in their interests in respect of domestic commerce, and not in their interests in respect of foreign and coastwise traffic. The word must be fitted to the character of the traffic involved. If the ports, in their indisputable interests in this traffic, are denied any standing as localities at the termini of the rails, because as origins of the rail import traffic and destinations of the rail export traffic their interests and functions are not the same as in respect of domestic commerce, then they will be subject to all the evils which section 3 was enacted to prevent. The legitimate character of the ports' interests in foreign and coastwise traffic is inherent in the nature of the traffic.

The legislative history of the Act to Regulate Commerce, 1887, and of the Hepburn Act, 1906, which latter amended section 15 to confer enforcement powers of legislative nature, show that it was the intention to cover the ports among the localities given regulatory protection.

2. Equal rates charged on traffic to rival ports from territory substantially nearer the one than the other cause preference and prejudice just as do unequal rates for like service. In determining whether the preference and prejudice is undue or unreasonable the competitive interests of carriers maintaining the equalized rates must be considered, but by the same token the natural advantage of location of the prejudiced ports may not be excluded from administrative consideration.

The Commission's reports expressly show that it gave consideration to appellant carriers' competitive interests. Its order gave concrete recognition to such interests and preferred interests by permitting equalization of New Orleans rates with those of Galveston from origins up to 25 per cent nearer the latter and by prescribing moderate differentials only from origins still nearer to Galveston.

Whenever the carriers assert their competitive needs as justification for discrimination, the evidence is in excuse for departures from the "transportation measure" as weighed against evidence of injury caused thereby. The situation obtains in

cases affecting domestic commerce as well as foreign and coastwise commerce. Such departures from the transportation measure as are found justified are, however, in a direction that still leaves the preferred locality with a "transportation" advantage and the prejudiced locality at "transportation" disadvantage.

The Commission's orders are not rendered invalid because the carriers' competitive interests, coupled with the interests benefited or preferred by the equalized rates, were not regarded as full justification. The adoption of such principle would nullify Section 3; for the effect thereof would be that the undue or unreasonable preference or prejudice which is forbidden by law would be declared to be due and reasonable if it appeared to be so from the standpoint of the carrier's interests and the preferred interests, without need for giving consideration to the interests discriminated against.

3. Appellant New Orleans alleges that the Commission's action constitutes an invasion of the industrial field in an attempt to equalize natural and economic conditions under the guise of regulating transportation.

The orders operate to secure just, due, and reasonable rate recognition of the relative amounts of transportation service to the respective ports and of the interests involved. New Orleans is left free

to compete for traffic in differential territory under properly related rates and, in doing so, to use all advantages possessed by it, natural or acquired. All that is taken from New Orleans is the artificial advantage of a patently improperly related rate structure.

4. The Commission's finding that the carriers' practice of charging the same rates to New Orleans as to the Texas ports from and to territory nearer the latter caused undue preference and prejudice is supported by a very full record. Numerous exhibits of domestic rates (not made under stress of carrier competition) showed uniformly higher levels to New Orleans than to the Texas ports from common origins involved. Transportation conditions were shown and found to be substantially the same throughout the territory. Exhibits of average operating costs and of other operating statistics showed that it cost at least as much per mile to handle tonnage over the Texas & Pacific to New Orleans as it did over the Santa Fe and M. K. T. to the Texas ports. With the cost and value of a mile of transportation substantially the same, there is little room for dispute that the same rates to New Orleans as to the Texas ports for hauls ranging upward from 25 per cent longer gives a preference to the former. Furthermore, there is evidence and testimony that the preferential rate structure had checked the flow of traffic to the Texas ports from

this naturally tributary territory and retarded port development. (R. 3378, 3390.) In fact, all elements readily conceivable as bearing in any way on the feature of injury resulting from the preferential rate structures were placed before the Commission and were thoroughly summarized and weighed.

5. Appellants, the Texas & Pacific and the L. R. & N., were just as much parties to the discrimination between New Orleans and the Texas ports as if they served all ports with their own lines. They reached the preferred port of New Orleans with their own lines and were parties to through routes and joint rates to the prejudiced Texas ports. "Localities require protection as much from combinations of connecting carriers as from single carriers whose rails reach them." *St. Louis S. W. Ry.* v. *United States,* 245 U. S. 136, 144. All carriers necessary for carrying out the order for removal of the discrimination, whether by raising the rates to New Orleans or by lowering the rates to the Texas ports, were before the Commission, and "wherever discrimination is, in fact, practiced, an order to remove it may issue; and the order may extend to every carrier who participates in inflicting the injury." *Chicago, I. & L. Ry.* v. *U. S.,* 270 U. S. 287, 293. Moreover, while appellants had not sole control over the rates to the Texas ports, they were in a position, acting alone, to remove the

discrimination by raising their rates to New Orleans. *U. S.* v. *Ill. Cent. R. R.*, 263 U. S. 515, 521.

6. The instant orders are not shown to be arbitrary by the fact that certain general orders, granting relief from the prohibition of Section 4 of the Act against charging more for a longer than for a shorter distance over the same route, permit of greater differences in distance than 25 per cent in authorizing circuitous lines to meet the rates of short-distance lines between the same origins and destinations. The considerations entering into said 4th section circuity limitations are not comparable with those here involved. Furthermore the "alleged inconsistency with findings made in other proceedings" is not matter here relevant. *Virginian Ry.* v. *United States,* 272 U. S. 658.

7. While regulation of railroad rates under the commerce clause of the Constitution may affect the ports of one state more than those of another, that is not the giving of preference within the meaning of the clause of the Constitution that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another." *Armour Packing Co.* v. *U. S.,* 209 U. S. 56, 80.

ARGUMENT

I. IN THEIR RESPECTIVE RELATIONS TO THE EXPORT, IMPORT, AND COASTWISE TRAFFIC AFFECTED AND THE RATES CONDEMNED, THE PORT OF NEW ORLEANS WAS A LOCALITY UNDULY PREFERRED AND THE TEXAS PORTS WERE LOCALITIES UNDULY PREJUDICED WITHIN THE SENSE AND MEANING OF SECTIONS 3 (1) AND 15 (1) OF THE ACT

a. The prohibition of Section 3 against any undue or unreasonable preference of, or prejudice to, any locality in any respect whatsoever covers the ports in their great interests inherent in export, import, and coastwise traffic, as well as in their interests in domestic traffic

Section 3 (1) of the Act provides that it shall be unlawful for any carrier subject to the Act

> to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable preference or disadvantage in any respect whatsoever.

This provision forbids the causing of any undue preference or prejudice in any respect whatsoever, not only to any person, firm, or corporation, but also to any locality. In using the word "locality" the Act plainly is not speaking merely of an aggregation of consignors or of consignees. The ports are entitled to the protection of Section 3 from the

standpoint of their shipper interests[14] alone; that is, their exporters, importers, dealers, agents, and factors doing business at said ports and actively engaged in shipping merchandise in foreign or coastwise commerce. Such "shipper interests" are part of the "locality" interests of Galveston (R. 3348) and were also advanced by complainant, Galveston Commercial Association, as the interests of "persons" at Galveston (R. 3306, 3348) included in its membership and which it represented.[15] This should be emphasized before pointing out other legitimate "locality" interests, because whether regarded as prejudice to "persons" or to the "locality" the record is replete with the rate prejudice encountered by shipper businesses at Galveston and causing stagnation in this particular of the community. (R. 3390, 3378, 291 to 295, 616, 2276.)

But the legitimate interests of the ports in this character of traffic do not stop with shipper interests. While this Court has not defined the scope of the transportation interests either of persons or of places that may be asserted under Section 3, the many decisions which have spoken of the Act's purpose to prevent undue preference or

[14] Shippers, whether consignors or consignees (principal or agent) or otherwise connected with the rail transportation contract.

[15] Concerning the invoking of the Commission's powers, compare *United States* v. *Merch., etc., Ass'n*, 242 U. S. 178, 184; *Int. Com. Com.* v. *Baird*, 194 U. S. 25, 39; *United States* v. *N. Y. Cent. R. R.*, 272 U. S. 457, 462.

prejudice as between persons (*Int. Com. Com.* v. *Baird,* 194 U. S. 25, 39) and between localities or communities plainly have not referred solely to the traffic interests of that class of citizenry whose business is of a kind that they customarily are in direct contract relation with the railroads. *United States* v. *Merchants, etc., Assn.,* 242 U. S. 178. *Int. Com. Com.* v. *Chi. R. I. & Pac. Ry.,* 218 U. S. 88, 102; *Int. Com. Com.* v. *Ala. Mid. Ry.,* 168 U. S. 144, 165, 166. In *Texas & Pac. Ry.* v. *Int. Com. Com.* (*Import Rate Case*), 162 U. S. 197, 219, the court said that the very use of the words undue and unreasonable necessarily implied—

> that strict uniformity is not to be enforced, but that all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies and of the producers, shippers, and consumers should be considered by a tribunal appointed to carry into effect and enforce the provisions of the Act.

A reading of the above-mentioned decisions and other decisions leaves no doubt that the interests of the "localities" mentioned entitling them to nondiscriminatory rates reaches farther than those interests or businesses dealing directly with the railroads. For example, there can be no question that such locality interests as produce or consume the traffic and thus supply the business for the railroads are legitimate interests to be considered

when protest is made against unjust rates. There is interdependence of interest between them and the railroads, irrespective of any contractual relationship; that is, the railroads are dependent upon the welfare of such producer and consumer interests [16] and the latter in their turn are dependent upon the welfare of the railroads. The same interdependence of interest exists between the railroads and the ports in respect of export, import, and coastwise commerce. A port's interest in said traffic is not that of a producer locality which has goods to be transported or that of a consumer locality purchasing goods that have been transported but lies in its facilities, industries, and activities devoted to the traffic. Whether or not the ports are termed origins or destinations,[17] since the rail movement commences or ends with them,[18] they are producer localities in the sense that their

[16] Many producers, particularly of agricultural products, are not shippers; agents of wholesalers or other dealers often buy on the ground, assemble, and ship. As for consumers, the so-called "ultimate consumer" practically always buys locally.

[17] No joint rail-and-water rates and no joint through rates are here involved. The shipper must make two separate contracts, one with the rail carrier and one with the ocean carrier; and the latter may be one of the conference lines, an independent line, or a "tramp."

[18] As showing that ports are destinations for all purposes of the Act see *Chamber of Commerce* v. *N. Y. Cent. R. R.*, 24 I. C. C. 55, 74; *Armour Packing Co.* v. *U. S.*, 209 U. S. 56; *Cosmopolitan Shipping Co.* v. *Hamburg-American*, 13 I. C. C. 268.

facilities and activities are essential to obtain for the consumers of the country the imported goods, and for the railroads the carriage of the traffic; and they are consumer localities in the sense that their facilities and activities are essential to obtain for the producers of the country the marketing of surplus production and for the railroads the carriage of the traffic. The matter of importance is not that such analogy can be drawn but is that the analogy brings out that the ports have facilities and activities devoted to and essential to the existence of this character of traffic, which because of such interdependence are legitimate interests that must be recognized.

On the physical or investment side ports must have harbors and channels which are adequate (either naturally or made so artificially) for the handling and protecting of the boats; they must have the wharves, dry docks, and other facilities for accommodating, loading, and fueling the boats, and for repairing them when needed, and they must have facilities for transshipment of the merchandise and for warehousing. (R. 289, 290, 3384 to 3387.) On the commercial side there are the activities incidental to the affording of said facilities, and there are the exporters, importers, and other dealers and factors, the booking agencies, marine insurance agents, bankers, and houses dealing in foreign exchange. (R. 3384, 3389, 3390.) And the retail trade of a shipping locality must be

prepared to meet in kind and volume the needs of vessels for all manner of supplies.

Of these locality interests, those of exporters, importers, commission houses, and others engaged in shipping by rail are, as aforesaid, direct "shipper interests."[19] On the other hand, the harbors, wharves, and other facilities for accommodating the boats are not such direct "shipper interests," but the existence of rail traffic in foreign and coastwise commerce is dependent thereon, and, in fact, such traffic would never have existed at a locality lacking the same. Also, the other mentioned facilities, industries, and activities, although not direct shipper interests, are plainly essential to the existence of the rail traffic, and they in their turn are dependent thereon.

The fact that the ports are not localities which physically produce, or physically consume or use, the traffic, does not place them either outside the language or outside the spirit of a statute which declares it to be unlawful for the railroads to cause any undue preference or prejudice to any locality in any respect whatsoever. The comprehensive word "locality," particularly as used in such a sweeping prohibition, does not permit of a construction that would cover the ports only in their interests in respect of domestic commerce and not

[19] *Liverpool Corn Traders Assn.* v. *L. & N. W. Ry.*, 7 Ry. & C. Traffic Cases 125, 129, 130; *Town Commissioners of Newry* v. *Grt. Nor. Ry.*, 7 Ry. & C. Traffic Cases 184.

in their interests in respect of export, import, and coastwise traffic. The word "locality" must be construed with relation to the character of the traffic involved. If the ports, in their indisputable interest in this traffic, are denied any standing as localities at the termini of the rails, because, as origins of the rail import traffic and destinations of the rail export traffic, their interests and functions are not the same as in respect of domestic commerce, then they will be subject, in those great interests which are inherent in this character of traffic, to all the evils which it was the remedial purpose of Section 3 to prevent.

(1) The legislative history of Sections 3 (1) and 15 (1) shows that it was the intention to protect the interests of the ports in export, import, and coastwise traffic

Section 3 of the Act to Regulate Commerce (Feb. 4, 1887) was patterned upon Section 2 of the English Railway & Canal Traffic Act of 1854 (17 & 18 Vict., c. 31), except that in the English Act the undue preference or prejudice was prohibited in respect of "any particular person or company" whereas in the American Act it was prohibited in respect of "any particular person, company, firm, corporation, or locality." The English Act of 1854 was later supplemented by Regulation of Railways Act, 1873 (36 and 37 Vict., cap. 48), section 13 whereof authorized complaints of a contravention of section 2 of the 1854 Act by "a municipal or other public corporation, local or harbor

board, without proof that the complainants are aggrieved by the contravention."[20] The corresponding section (sec. 13) of the Act to Regulate Commerce read in part as follows:

> That any person, firm, corporation, or association, or any mercantile, agricultural, or

[20] In *Ayr Harbour Trustees & P. Barr & Co.* v. *Glasgow & S. W. Ry.*, 4 Ry. & C. Traff. Cases 81, pages 87 and 91, a harbor board and steamship firm complaining of through rates favoring another port were held not to have standing to apply for like through rates, that right being confined by sec. 11 of the 1873 Act to "railway and canal companies"; but it was held that said harbor board and steamship company were unduly prejudiced and the traders and harbor board at the rival port unduly preferred in that the local rate to the one port was higher than the rail proportion to the other port of the through rate. This case was decided in June 1882 and, on the question of standing of a harbor board and steamship company to complain of undue prejudice, seems to have been overruled in *Londonderry Port Commissioners* v. *Great Nor. Ry.*, (August, 1887) 5 Ry. & C. Traff. Cases 282, 286, a case decided after enactment of the Act to Regulate Commerce and which will be later discussed.

The Railway & Canal Traffic Act, (August) 1888 (51 & 52 Vict., cap. 25), section 30, authorized any port or harbor authority or dock company to complain of rates or treatment "placing their port, harbor or dock at an undue disadvantage as compared with any other port, harbor or dock" and conferred on the Commissioners like jurisdiction to determine the subject matter as they had of complaints made under the undue preference clause. Section 7 of said Act names "harbour boards" among the local authorities that could file complaints without showing that they were aggrieved; and section 55 defined harbor boards to mean any persons who are otherwise than for private profit empowered to construct, manage, regulate and maintain a harbor whether natural or artificial, or any dock.

> manufacturing society, or any body politic or municipal organization complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act in contravention of the provisions thereof, may apply to said Commission * * *.

Said section also authorized the Commission to institute any inquiry on its own motion and provided that no complaint should be dismissed because of the absence of direct damage to the complainant.[21] The section did not name "local or harbour boards," but instead used the phraseology "any body politic or municipal organization," which substitution, coupled with the comprehensive provision for complaints by any person, firm, corporation, or association covered the whole field of public authority (however styled) and of private interests at the ports and other localities.

Appellant carrier's brief on reargument discusses in Chapter III the committee reports and statements of committee members with respect to those portions of the Senate and House Bills which

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[21] This provision goes further than the English Act in that it in substance permits complaints by private interests as well as public bodies without proof that they are aggrieved. *Int. Com. Com.* v. *Baird*, 194 U. S. 25, 39. In England public bodies had first to obtain certificate from Board of Trade. British System of Railway Regulation Until 1914, Aitchison Sec. 173. Locus Standi of Public Bodies as Complainants (unpublished manuscript at American University Library).

became sections 2, 3, and 4 of the Act to Regulate Commerce. The position taken by appellants is that section 3 was intended to afford protection against discrimination to shippers only. In support the brief points to a statement in the House Conferees' report that the third section requires "equal facilities and advantages for all shippers without exception" (Br. p. 27) to a statement by a House Committee member that the provision in the House Bill forbidding discrimination "in favor of one person over another in rates, facilities of transportation * * *" "declares that the small shipper shall send his little upon the same terms in all respects as the large shipper" (Br. p. 26), and to a statement by Senator Cullom that the object of section 2 was "to place all shippers upon an absolute equality as to the rates charged for a like service under substantially similar circumstances" (Br. p. 24). Concerning this latter statement appellant carriers' brief goes on to state that:

> Commenting on the relationship between the second and third sections, he (Senator Cullom) observed, "The third section is broader and more general in its terms, and should perhaps have been made the second section, as it contains a general prohibition of every variety of unjust discrimination * * *. This covers in general terms, though by no means so completely, the provisions of section 2 as to discriminations against persons, but goes further and in-

cludes discriminations against localities or particular descriptions of traffic." [22]

The term persons covers shippers. Why, therefore, should Congress have gone further and included discrimination against localities unless it was to protect broader interests—legitimate locality transportation interests which patently exist and through which a locality may be injured quite as much as through its direct shipper interests.

The Commission has from early days regarded ports as localities covered by section 3 in respect of this character of traffic. *N. Y. Produce Exch.* v. *B. & O. R. R. Co.*, 7 I. C. C. 612, 658, 660; *In re Export and Domestic Rates*, 8 I. C. C. 214; *In re Differential Rates*, 11 I. C. C. 13; *Chamber of Commerce of N. Y.* v. *New York Central*, 24 I. C. C. 55, 27 I. C. C. 238; *In re Import Rates*, 24 I. C. C. 78; *Mobile Chamber of Commerce* v. *Mobile & O. R. Co.*, 57 I. C. C. 554; *New York Harbor Case*, 47 I. C. C. 643; *Maritime Assn., Chamber of Commerce, Boston*, v. *Ann Arbor R. Co.*, 95 I. C. C. 539; *Oswego* v. *B. & O. R. Co.*, 151 I. C. C. 717. In the *New York Produce Exchange Case, supra*, the principles laid down are those followed to-day. For example, after stating (p. 659) that the primary purpose of the differentials as maintained by the

[22] For further statements that the purpose was to prevent discrimination "as between different places, persons and commodities" see Cullom Report, S. Rep. No. 46, 49th Cong., 1st Sess. pages 182, 215–216, 178.

carriers was not to do justice to a particular port, nor to recognize the advantages of a particular port, but to enable the various competing lines to obtain a fair proportion of the traffic, the Commission said, pages 659, 660:

> Do these competitive conditions justify the preference of one locality to another? It is clear under the recent decisions of the United States Supreme Court, not that they necessarily do but that they may. * * *

The Commission then cited the *Import Rate Case,* 162 U. S. 197, and at page 661 continued as follows:

> Evidently in applying this rule to a particular case the just interest of the carrier should be considered. Carriers are allowed to prefer one locality to another under stress of competition in some instances, for the reason that the interest of the carrier requires it; but every preference is to a degree a hardship upon the community against which it is enforced, and that hardship should be, in a way, set over against the interest of the carrier. * * *

And again at page 683 the Commission said:

> It might happen that some combination of these lines, for the purpose promoting their interests at some other point, would sacrifice the port of New York, or that for the purpose of promoting their interests as to some other kind of traffic they would sacrifice this particular traffic. If anything of that sort were apparent, if there seemed to

> be anything arbitrary, anything unreasonable, any undue preference against this locality or this species of traffic, it would be our duty to correct it. But there is nothing of that kind and we can do no better than to leave this matter where competition has left it.

Equally plain references to ports as localities will be found in the Commission's report in *In Re Differential Rates,* 11 I. C. C. 13, 62, which was rendered April 27, 1905, just before Congress conferred power of legislative nature upon the Commission.

The principle is a familiar one that the interpretation given to a doubtful statute by the body charged with its practical administration is entitled to weight. *Logan* v. *Davis,* 233 U. S. 613, 627; *United States* v. *Minnesota,* 270 U. S. 181, 205. There is also the rule that, where such interpretation has long obtained and has been impliedly sanctioned by reenactment of the statute without alteration in the particulars construed, it should be treated as read into the statute (*New Haven R. R.* v. *Int. Com. Com.,* 200 U. S. 361, 402); for Congress may be presumed to have legislated with knowledge of such established construction. *National Lead Co.* v. *United States,* 252 U. S. 140, 147; *United States* v. *Bailey,* 9 Pet. 238, 256.

By the Hepburn Act, 1906 (34 Stat. 584), Congress made great changes in the Act to Regulate Commerce. The new legislation did not expressly

reenact section 3, but Congress' reason for not pursuing that course was that it desired to preserve interpretation that had been given the statute by the Commission and courts. In the report from the House Committee, submitted by Congressman Hepburn with H. R. 12987, it is stated:

> * * * The Interstate Commerce law has been in force nearly twenty years. During that time the Interstate Commerce Commission and the Courts have given construction to many of its provisions. Therefore it was not deemed wise to attempt an entire new enactment, but, on the contrary, to preserve all of the law that could be preserved and only amend it in the direction of giving more power and making more plain some of its provisions. * * * (Report No. 591, 59th Cong., 1st Session.)

Furthermore, although the Hepburn Act did not expressly mention section 3, it dealt very importantly therewith in that by its amendment to section 15 the Commission's theretofore limited jurisdiction in respect of enforcement of the Act's provisions (*Int. Com. Com.* v. *Ala. Mid. Ry.*, 168 U. S. 144, 153, 162) was enlarged to include, among other things, the power to deal directly with discriminations and other violations of the Act by prescribing the rate or practice "to be thereafter observed" and by ordering the carriers to desist from any such violation "to the extent that the Commission finds the same to exist." (34 Stat. 589.)

That, in enacting the legislation, the matter of the interests of ports was before Congress is shown by the fact that, after objection to the senate bill was made on the ground, in substance, that the conferring of the rate-making power upon the Commission would in practice be nugatory as a regulation of relative rates to or from the ports of the States in violation of the "port preference" clause of the Constitution (par. 6, sec. IX, Art. 1), the views of the Attorney General and of the Commission were obtained upon that question.[23] The Attorney General rendered an opinion (25 Op. Atty. Gen. 435) in which he said among other things:

> I conclude, therefore, that any law for the fixing of rates, according to the standard of reasonableness, impartiality, and justice, or any action taken by a subordinate administrative body in the execution of such a law, would not be obnoxious to Article I, section 9, paragraph 6, of the Constitution, even if it resulted in dissimilar rates to and from the ports of different States.

The Commission's response to the inquiry expressed the same conclusion. (Vol. 2, Hearings

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[23] The inquiry made to the Commissions seems to have been specifically directed to the effect of the proposed legislation on the "differential rates" to the ports. (Vol. 2, Hearings before Senate Committee, 1904–5, page 965.)

The same constitutional objection, among other objections, was made by Senator Elkins in submitting report of minority views of Senate Committee upon the Hepburn Bill, H. R. 12987 (Rep. 1242, part 2, page 8, 59th Cong., 1st Sess.).

before Interstate Commerce Committee of the Senate, 1904–5, pages 965, 1662.) [24]

As showing that the interests of the gulf ports concerned in this controversy were placed before the Committee of the Whole House, attention is called to the following questions which were asked during its consideration of the Hepburn Bill and the answers made by Mr. Adamson, committee member in charge of the bill:

> Mr. BOUTELL. I have read recently in several of the leading southern papers very earnest editorials, written prior to the introduction of this bill, protesting against this policy of fixing railroad rates by a Commission and expressing, what seemed to them, well-grounded fears that this Commission in fixing rates, for example, from the Mississippi Valley and the West to tidewater, would inevitably discriminate against the southern Gulf ports and in favor of the Atlantic ports.
>
> Now, if those fears were well grounded, certainly they are worthy of most earnest and serious consideration; and if it would be in the line of the gentleman's argument, I should like to have him refer to that matter as to whether those fears were well grounded; secondly, if well grounded, whether this measure as recast throws such protection around these ports as to give them the nat-

[24] See also U. S. Senate, Committee on Interstate Commerce, Regulation of Railway Rates, Digest of Hearings, 1904–5, compiled by order of the Committee, pages 92, 93.

ural advantages of geographical situation; and third, whether it is the design of the movers of this measure to do away with the natural advantages of geographical situation in acquiring the business of the country.

Mr. ADAMSON. I thank the gentleman for his interruption. * * *

Mr. BOUTELL. I remember about three or four weeks ago the New Orleans papers, which I reckon among the most ably edited papers in the country, expressed the serious fear that the natural advantages of the port of New Orleans would be discriminated against in this legislation; and I trust the gentleman will appreciate that these articles that I referred to seemed to be those that were animated by the civic pride of these Gulf ports and absolutely disconnected with any corporate or railroad influence.

Mr. ADAMSON. I have no doubt in the world that the press as well as a great many of the people at New Orleans, Savannah, Mobile, Brunswick, Galveston, Charleston, and ports on the south Atlantic seaboard and the Gulf do in good faith cherish very grave doubts and fears as to the dangers that they may suffer at the hands of the Commission, if it should be a partisan or sectional Commission. Now, I have been doing my best to divest myself of the idea of sectionalism. Bearing in mind the language of my friend from Minnesota [Mr. Bede] the other day, quoting the Kentucky girl, that Yankee would be only half a word, that it ought to be "Damnedyankee," I do not want that in

> my head at all. I have never said a sectional or partisan word as such since I have been in this House, and so help me God, as a patriotic American citizen, I never will. * * * (Cong. Rec., Vol. 40, Part 2, p. 1777, 59th Cong., 1st Sess.)

Mr. Boutell's questions squarely raised the matter of conferring power on the Commission to regulate rates to the ports in their relation to rates to other ports. Mr. Adamson's answer, above quoted, and his further remarks showed that such was the purpose—placing reliance on a nonsectional administrative body.

Reverting to the legislative history of the Cullom Act—the original Act to Regulate Commerce, 1887—a statement of Senator Cullom set forth in Appellant carriers' brief must be read in light of his further remarks for its proper understanding. The brief (p. 27, 28) refers to questions of Senator Hoar as to the effect of the proposed Act on the rates of the port of Boston in their relation to the rates of other ports, and quotes the following reply of Senator Cullom:

> Mr. President, it may be said to be rather unfortunate that Boston is a little farther away from the center of gravity than New York; but I do not think, myself, that there is anything in this bill which prohibits a railroad from carrying to Boston just as cheaply as it carries to New York from Chicago or Omaha or San Francisco, and there is not anything now that prevents it.

But Senator Hoar persisted in his questions, later saying:

> My friend does not still answer the question. Do you not prohibit them from carrying it to Boston at a less rate than they carry it to Springfield, or Worcester, or Fall River, or to any other point on the line in Massachusetts?
>
> Mr. CULLOM. At a less rate; yes.
>
> Mr. HOAR. That is exactly the point. We have got, therefore, have we not, under your bill to put down Worcester and Springfield and Fall River to the New York rate, or else Boston can not have the exports?
>
> Mr. CULLOM. Has the Senator any objection to having the rate put down? Is there any reason why the rates to New York and Boston should not be the same?

And, after further colloquy, Senator Hoar asked:

> What I want to know of the Senator now is, not to debate this matter, but to ascertain the meaning of the bill. Do I correctly understand him as saying that the right to continue that foreign commerce, in which the condition is what I have stated, to be dependent in the future, under the act of Congress, on the opinion of five commissioners? More than that, is that foreign commerce to stop for a while, to be revived again a few months later, when the commission have organized and got around to this matter?
>
> Mr. CULLOM. Mr. President, it is pretty difficult to pass any act providing for any

regulation whatever that may not appear to harshly interfere with what somebody is doing. Now, so far as I am concerned, I have no disposition to interfere with the foreign commerce of this country. I would very much prefer to see the foreign commerce increase, if it can be done, consistent with the protection of the great masses of the people of this country outside of the seaports.

* * * * *

Now, how are we ever going to regulate these railroads? The Senator from Massachusetts steps in and says that is going to interfere with the trade of Boston; it is going to stop the export trade and the import trade that is going on at the city of Boston. I do not know whether it will do so or not, but I do not believe it will, because those words, as I said awhile ago, "under like conditions and circumstances," are words that the commission, that the railroad men, that the courts are bound to construe in the most liberal manner consistent with the actual honest commerce of this country.

I undertake to say that you can not pass any bill which will in any way restrict the traffic carried on by corporations unless you have something that will in some way appear to interfere with localities or with individual interests which are being carried on. * * *

But I do not believe it will be enforced as the letter of it reads in all cases, but that a proper and liberal construction will be given by the courts and by the commission and by

> the railroads themselves to the words I have referred to. My own judgment is that if the common carriers of this country proceed right along in the discharge of their honest duties as common carriers and construe those words liberally so that they may carry the products of the West to the city of Boston to be transported to the people on the other side of the water, there will be no interference with that work by the commission, by the courts, or by anybody else. But if we are going to regulate these corporations at all, if we are going to stop unjust discriminations and the secret rebates by which towns are built up and towns are destroyed, by which individuals are destroyed and individuals are built up, we must have something in the bill which will mean something, or else we might as well lay the bill on the table and go at other business. (Cong. Rec., Vol. 18, Part I, page 486, 49th Cong., 2d sess.)

This explanation related particularly to the prohibition of the fourth section against charging more for a shorter than a longer distance over the same line or route under substantially similar circumstances and conditions.[25] Senator Cullom had, however, theretofore explained the relation of the

[25] In 1910 the words " under substantially similar circumstances and conditions " were stricken from section 4, making that section a rigid prohibition against charging more for a shorter than a longer distance over *the same line or route* unless authority of the Commission was *first* obtained. *Intermountain Rate Cases*, 234 U. S. 476, 481, 482.

4th section to the third section and, after reading the latter, had said:

> This is likewise a declaration that a greater sum shall not be charged for a shorter than for a longer haul under similar circumstances and conditions, because such a charge would be the making or the giving of an "undue or unreasonable preference or advantage" to one particular "locality," or would subject some other particular "locality" to an "undue or unreasonable prejudice or disadvantage." (Cong. Rec., Vol. 18, Part I, p. 485.)

As above said, appellant carriers' argument that ports are not "localities" is based on the position that the purpose of the Act to do away with all manner of discrimination is aimed at the safeguarding of the interests of shippers only. Shippers are just as often mentioned in the Committee reports on the Hepburn Bill as they are in those on the Cullom Bill; it would be a matter for surprise if they were not, since it is through the charges made to them that every transportation interest is affected, including those at the ports devoted to this character of traffic and in turn dependent thereon. But the purpose to prevent discrimination against localities is also repeatedly stated, and it is immediately connected up with the regulating of rates to the ports.

The many shipper interests at the ports which figured prominently in this case are just as useful to the commerce of the country as any other shipper

interests. It can not be doubted that a port may be injured in those interests. Importers, exporters, and other dealers, whether taking title to the merchandise or acting on commission, whether the principal concerns or branch agents of big houses, or buyers for foreign concerns, are naturally deterred from locating at ports which are laboring under prejudicial treatment. Economic reasons are against their doing so when it is open to them to establish themselves at the favored ports. (R. 3390, 289, 2276.) And by the same token persons or concerns already identified with such ports in their investments, staff, and time and labor spent in establishing themselves thereat are discriminated against when denied rate recognition of proximity to territory naturally tributary to their ports.

Appellant carriers' brief does not appear to dispute such shipper interests of the ports but states that Congress had no "intent to extend a helping hand to those, such as wharfingers and warehousemen, having no relation to commerce save a parasitic one." (Br. 23.) Viewed in the perspective of any important port, its wharves and warehouses call to mind large water-front investment and many activities. Its harbor has figured largely in the establishment and growth of the community, and certainly much of its commercial life centers on foreign and coastwise commerce. The relation of those interests and activities to the rail movement of such commerce is not parasitical, since they are essential to the existence thereof at the particular

locality; it is by reason of the fact that they are devoted to this commerce that they are susceptible to injury if discriminated against by the carriers. Clearly they must be held to give standing to a port unless the commerce is to remain unregulated, or be regulated with eyes closed to an important part of the public interest immediately concerned.

b. The fact that the preferentially low rates to New Orleans on foreign and coastwise traffic from and to origins nearer the Texas ports were induced by the competitive interests of appellant carriers was given full consideration by the Commission

The above chapter shows that it was Congress' express purpose that section 3's prohibition against causing any undue preference of, or prejudice to, any locality in any respect whatsoever should cover the ports; and, further, that the ports are well within the statutes' remedial purpose since the interests which give them standing are of a kind which, on the one hand, are essential to the existence of rail traffic in export, import, and coastwise movement, and which, on the other hand, renders them particularly susceptible to injury if subjected to prejudicial treatment. In the instant case the discrimination practiced against Galveston was induced by the carriers' competitive interests; that is, appellant railroads were maintaining the equalized rates in order to establish relatively lower rates from the origins nearer Galveston in order to secure the traffic for their longer hauls to New Orleans. But it is apparent that the practice of

making rates to a distant port the same as those charged to the port nearer to the origin territory may be carried to a point where the competitive interest of the carriers may not be said to outweigh the damage resulting to the port and interests thereat nearer the origin territory. If it were otherwise, carriers could justify discrimination by showing that it was rendered reasonable by their own self-interest without regard for the effect of the discrimination on the locality.

In regulating rate the Commission must, of course, give consideration to a locality's natural advantage of proximity to origin or destination territory which, with transportation conditions substantially similar, is the same as saying that the amount of transportation performed under rates must enter into its determination. It follows that the prohibition of section 3 against the causing of any undue preference or prejudice to any persons or localities "in any respect whatsoever" is applicable in respect of inequality of service at the same rate quite as much as in respect of inequality of rates for the same service. This is, it would seem, axiomatic. And it is expressly recognized in rates graded on distance when applied territorially to remove discriminations between localities according to their distance from destinations. *Georgia Comm.* v. *United States,* 283 U. S. 765; *Alabama* v. *United States,* 279 U. S. 229, 283 U. S. 776. In the *Shreveport Case,* 234 U. S. 342, 348, this Court, in giving illustrative instances of the

character of the rate adjustment which was condemned, said, among other things:

> It appeared, for example, that a rate of 60 cents carried first class traffic a distance of 160 miles eastward from Dallas, while the same rate would carry the same class of traffic only 55 miles into Texas from Shreveport.

In short, so long as the measure of rates based on transportation service remains one of the important guiding principles of regulation, a locality's natural advantage of proximity to territory involved must enter into the Commission's determinations. Indeed, if the prohibition in section 3 were unqualified, that is, if it forbade any preference or prejudice, instead of any undue or unreasonable preference or prejudice (*Tex. & Pac. Ry.* v. *Int. Com. Com.* (*Import Rate Case*), 162 U. S. 197, 226, 219; *Nashville Ry.* v. *Tennessee*, 262 U. S. 318), it would seem that a locality could demand a rate relationship with other localities absolutely governed by the respective amounts of transportation service involved.

Appellants do not, in fact, appear to seriously question that section 3 prohibits undue discrimination in the amounts of transportation at the same rates as well as inequality of rates for the same amounts of transportation. The contention most pressed by them is, in substance, that the discrimination was justified because the equalization of the New Orleans rates with those to Galveston was

for the purpose of establishing at the origins near Galveston equality of competitive opportunity to secure the traffic for their hauls to New Orleans. This is, it seems, asserted as justification in law—that is, that the preference and prejudice could not be undue or unreasonable when thus induced by their competitive self-interest. To the extent that appellants are contending that the Commission gave no consideration to the competitive situation, that contention is disputed, as will be later shown, by the Commission's report and its order, which latter gave concrete recognition to appellant carriers' competitive interests.

Following enactment of the Act to Regulate Commerce, this Court, in numerous decisions involving suits by the Commission to enforce its orders,[26] dealt with the question as to whether the fact that rates lower to a more distant than to an intermediate locality had been established to meet the rates of water or rail competition at the more distant point was a proper element to be considered in determining whether the discrimination was in respect of transportation under dissimilar circumstances and conditions, and thus not a violation of

[26] These orders were made prior to the Hepburn Amendment of 1906 (34 Stat. 584) which conferred rate-making power on the Commission. Certain of them in part prescribed maximum rates and were held invalid because the Commission then had no power, legislative in nature; but for the most part they were orders requiring the carriers to desist from charging more for a shorter than a longer haul, made under the Commission's 4th section authority.

section 4, and in determining whether the discrimination was just, reasonable, and due, and thus not in violation of sections 2 and 3. Those decisions held that the refusal by the Commission, or a lower court,[27] to consider such element of carrier competition was error. *Cin., N. O. & Tex. Pac. Ry.* v. *Int. Com. Com.*, 162 U. S. 184, 195; *Int. Com. Com.* v. *Ala. Midland Ry.*, 168 U. S. 144, 166; *Louisville & Nashville R. R.* v. *Behlmer*, 175 U. S. 648, 672, 674; *Tex. & Pac. Ry.* v. *Int. Com. Com.* (*Import Rate Case*), 162 U. S. 197, 205. The latter case involved ocean carrier competition between Liverpool and San Francisco via Cape Horn and the Isthmus of Panama to meet which the Texas & Pacific had made a lower basis of rates on import than domestic traffic between New Orleans and San Francisco. In this latter case the Court observed, at page 207:

> But we understand the view of the Commission to have been that it was not competent for the Commission to consider such facts—that it was shut up by the terms of the act of Congress, to consider only such "circumstances and conditions" as pertained to the articles of traffic after they had reached and been delivered at a port of the United States or Canada.

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[27] Under the Act, as it then stood, the case made by the findings of the Commission was only prima facie and additional evidence was permitted in Court (*C. N. O. & T. P. Ry.* v. *I. C. C.*, *supra*, 195, 196), which together with the Commission's record was weighed by the lower courts and this Court. *I. C. C.* v. *Ala. Midland Ry.*, *supra*, 174 U. S. 176. Compare *L. & N. R. R.* v. *Behlmer*, *supra*, 675, and *I. C. C.* v. *Clyde S. S. Co.*, 181 U. S. 29, 32.

The Court made clear that the Commission was not so shut up by the terms of the Act; that what was unjust discrimination or undue or unreasonable preference or prejudice was a question of fact on which the Commission may and should consider the legitimate interests of the carriers and all affected (idem 219, 220, 233, 234). As emphasizing that competition inducing preferential or prejudicial rates in the interests of the carriers was not held to be justification in law, excluding other interests from the determination of fact as to whether or not the discrimination was due or reasonable, the English Case (therein quoted from at pages 227, 228) of *Denaby Main Colliery Co.* v. *Manchester, etc., Ry.,* 3 Ry. and Canal Traffic Cases, 426, is in point. The decision was by the Court of Appeals in a case arising under the "undue preference and prejudice clause" of the English Act from which section 3 of the Act to Regulate Commerce was taken. The Railway Commissioners had said that the rates gave a decided advantage to the distant collieries, but they, nevertheless, had found such advantage not undue or unreasonable. The appellants in the case objected to the fact that the Commissioners, in reaching such determination, had included consideration of the competitive situation which induced the preferentially low rates. On this feature the Court of Appeals said:

> * * * Now, there is no doubt that in coming to their determination the court below did have regard to competition between

> the Midland and the Northwestern, and the situation of these two furnaces which rendered such competition inevitable. If the appellants can make out that, in point of law, that is a consideration which can not be permitted to have any influence at all, that those circumstances must be rigidly excluded from consideration, and that they are not circumstances legitimately to be considered, no doubt they establish that the court below had erred in point of law. But it is necessary for them to go as far as that in order to make any way with this appeal, because once admit that to any extent, for any purpose, the question of competition can be allowed to enter in, *whether the court has given too much weight to it or too little, becomes a question of fact and not of law.* The point is undoubtedly a very important one. (Italics ours.)

Because this Court's decision in the *Alabama Midland Railway Case, supra,* repeatedly refers to competition as "an element" or "one of the matters" to be considered (pages 164, 166, 170), and because it has been referred to in a recent decision as precedent for the holding that the competitive interest of carriers is only one of the interests to be weighed together with other interests, its plain statement to that effect is here quoted. After stating that, "although competition which affects rates is one of the matters to be considered" under the third and fourth sections, it is not applicable to the

second section of the Act[28] and after giving the reasons for the distinction the decision reads, at page 167:

> In order further to guard against any misapprehension of the scope of our decision it may be well to observe that we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining the questions of "undue or unreasonable preference or advantage," or what are "substantially similar circumstances and conditions." The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the commission or the courts from taking that matter into consideration.

United States v. *Illinois Cent. R. R.*, 263 U. S. 515,[29] refers to said *Alabama Midland Case,* and the

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[28] *Wight* v. *United States*, 167 U. S. 512, is mentioned as precedent for this interpretation of section 2.

[29] In *Ill. Cent. R. R.* v. *Int. Com. Com.*, 206 U. S. 441, said early cases and the English case mentioned are reviewed at length to show that competition is an element to be considered along with other elements entering into the determination of fact.

Import Rate Case, and also comments on the effect of Transportation Act, 1920, as follows (page 525):

> * * * The innocent character of the discrimination practiced by the Illinois Central was not established, as a matter of law, by showing that the preferential rate was given to others for the purpose of developing traffic on the carrier's own lines or of securing competitive traffic. These were factors to be considered by the Commission; but they did not preclude a finding that the discrimination practiced is unjust. Such was the law even before Transportation Act, 1920. *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission,* 162 U. S. 197, 218, 220; *Interstate Commerce Commission* v. *Alabama Midland Ry.,* 168 U. S. 144, 167, 175. In view of the policy and provisions of that statute, the Commission may properly have concluded that the carrier's desire to originate traffic on its own lines, or to take traffic from a competitor, should not be given as much weight in determining the justness of a discrimination against a locality as theretofore.

Concerning the question whether the Commission did give consideration to the competitive situation, that is indisputably shown by its reports, by its findings, and by its order. The Commission's reports make frequent mention of the competitive situation in one way or another, but the following

seem sufficiently to link up the chain from report to findings and from findings to the order. In its second report the Commission said:

> But another principle, equally well settled, is that a carrier may meet competition so long as it is not guilty of undue prejudice, does not charge rates which are so low as to burden other traffic and does not contravene the declared policy of Congress to foster and preserve in full vigor both rail and water transportation. * * * (R. 3404.)

Later in the report it is said:

> * * * and even where injury is shown the preference or prejudice may, within limits, be justified by competition. * * * (R. 3414.)

And the Commission's conclusions of fact, after finding that equalization of rates resulted in substantially greater service at the same rate from origins near Galveston by more than 25 per cent and substantial injury and prejudice to the Texas ports, further found:

> that the competition relied upon by defendant herein is no justification for the resulting prejudice from and to the interior points referred to.

Patently, since this last finding is among the Commission's findings of fact, it shows that the Commission had considered and weighed the ele-

ments in the competitive situation relied upon by the carriers and had found as a fact that they were not justification beyond the limits fixed by its report and order. As said in the *Denaby Collieries Case, supra* (English case cited in *Import Rate Case*):

> * * * once admit that to any extent, for any purpose, the question of competition can be allowed to enter in, whether the court has given too much weight to it or too little, becomes a question of fact and not of law.

Appellant carriers' contention that the Commission refused to consider their competitive interests rests on the following statement in the second report:

> The Texas & Pacific insists that since this traffic neither originates at nor is destined to any of the ports, the rail rates which we are here considering are in essence proportional rates, constituting merely factors of the aggregate through rates between the interior points and the foreign or coastwise destinations beyond, and that in determining the matter of port equalization consideration should be given, not only to the rail factors, but also to the water factors which enter into these aggregates. *In Tobacco from Ohio River Crossings*, 73 I. C. C. 384, division 2 found a similar contention to be without merit. Equalization of port rates

> on the basis advocated by this carrier would require consideration in every instance of port relationship, of water rates not on file with us and over which, except on coastwise traffic under certain circumstances, we have no jurisdiction. This does not mean, however, that the fact that a port is not the origin or destination of the traffic passing through it is not entitled to consideration in countenancing greater disregard of distance in import, export, or coastwise rates than in corresponding domestic rates. (R. 3404, 3405.)

In its first report the Commission had said: "The steamship rates from and to foreign ports are usually the same to and from all the ports mentioned." (R. 3348.) In its second report the Commission said:

> The maximum ocean rates are fixed by the Gulf Shipping Conference and, except on so-called distress shipments, particularly on grain, are generally the same coastwise and foreign from and to all Gulf ports. The testimony is that rate differentials in favor of one or more Gulf ports would not result in lower steamship rates from or to the ports against which the differentials were established, at least not to the extent of the rail differentials. (R. 3387, 3388.)

Reading these two statements together it will be seen that the Commission recognized that there was

a general but not reliable situation obtaining in respect of ocean rates. This is its usual course. *Maritime Assn.* v. *Ann Arbor R. R.*, 95 I. C. C. 539, 554. What was rejected by the Commission was the carriers' suggestion that the rates of ocean vessels could enter into the determination as though they were in "essence" proportional rates constituting mere factors of through rates. All that was subject to the Act (its "transportation measure" and strict requirement that rates be observed as filed and published) were the land transportation and rates to the respective ports. The rates of ocean vessels, whether coastwise or to the many foreign ports, were not subject to the Act's "transportation measure," to its requirement of filing and publication, or to its penalties for departures from published rate schedules. Therefore they could not, any more in essence than in fact, enter into the determination as though they were mere factors of through rates subject to the Act and Commission jurisdiction.

In addition to the contention that the Commission refused to give consideration to the ocean rates as entering into the competitive situation, appellants, upon the premise of equal ocean rates (in the sense known to the Act) from the respective ports, also base an assertion of justification in law for the practice of equalizing rail rates to said ports. If applied at all, such doctrine would have

to be adopted generally, for, as advocated solely for this case, it would deny to particular ports their natural advantage of location and otherwise exclude their interests from administrative consideration under section 3. The thought appears to be that the equalized rail rates could not in law cause undue prejudice because, with the sum of the rail and ocean rates the same through either port, there could be no purely rate incentive to favor the one port over the other; that is, that with the rates equal, any disposition to favor New Orleans must be because of its "superior commercial and economic advantages" and, apparently, that the greater service at equal rates would add nothing to the incentive. This thought has the appearance of being sound only just so long as consideration is confined to the particular origins nearer Galveston, forgetting that the rival port has its own nearer tributary territory. As shown in the preliminary statement, New Orleans now enjoys rates lower than the Texas ports' rates from its nearer territory. (R. 3354, 3355, 3376, 3389, Ex. A–260.) And there is no offsetting differential in ocean rates to make the total to ultimate destinations the same through either port. In so far as said lower rail rates represent only the lesser service to New Orleans, Galveston has no grounds for complaint as to them under the Act. And even if there were carriers asserting their competitive need to maintain preferential

rates to Galveston, New Orleans would be entitled to have its natural advantage of location and other interests enter into the Commission's determination.

But, if equality in application of the regulatory laws is to be accorded Galveston, similarly, consideration of the transportation standard, which includes its natural advantage of proximity to origin territory, can not be altogether excluded from administrative consideration, even in a situation where within limits the competitive interests of carrers causing the preference and prejudice afford justification. The answer to the theory that equal rates, no matter what the disparity in transportation service thereunder, can cause no undue preference lies in the transportation standard. If traffic moves to New Orleans from origins nearer Galveston at equalized rates instead of having to pay a differential for the greater service, a purely rate incentive—an incentive based on the transportation standard—is necessarily afforded. Looked at from the other angle of the lower rates that would normally obtain for the lesser transportation services to Galveston, the rate obstacle or prejudice of equalized rates becomes particularly clear.

Coming, then, to recognition other than by words of the competitive situation, that is plainly shown in the Commission's order permitting equalization

of rates to New Orleans with those to Galveston between points in the "25 per cent zone" and the moderate differentials over the Galveston rates from and to origins still nearer Galveston. Witness Payne, Texas & Pacific Vice President in charge of traffic, testifying at the further hearings in the case, said:

> The Commission has recognized that there is a difference in the character of the traffic, as between export and domestic, and that export rates are but parts of through rates, in their order in this case, by prescribing differentials to New Orleans over Galveston instead of requiring that the domestic rates to New Orleans be applied in all cases. The domestic rates on some of the commodities in the case were fixed by this Commission on a mileage scale as reasonable rates for the distances involved, so that in ordering that lower than domestic rates be published they not only recognized that the traffic was subjected to a further haul beyond the ports but recognition was also given to the propriety of the longer line making some concession in its charges because of the competition of shorter lines, but in this respect they failed to go as far as in prior cases. (R. 932.)

As heretofore shown the Commission did not recognize that ocean rates were but parts of through rates but it did recognize the traffic as

distinct from domestic traffic and also the propriety of the longer lines making concessions in their charges because of competition of shorter lines. As illustrating this, the Commission's second report reads:

> The testimony leaves little doubt that the differentials prescribed in the original report, or even smaller differentials in most of the commodities, would in time divert to the Texas ports a substantial portion of most of the commodities having origin or destination in the affected territory that are now moving through New Orleans. On several of the commodities, however, green coffee, for instance, the movement that would be diverted from New Orleans would probably be small. The establishment of differentials would seem more certain to divert from New Orleans practically all of the movement of grain and grain products and petroleum and petroleum products originating in differential territory than any of the other commodities." (Record 3388.)

In connection with this review of testimony, it is significant that the Commission exempted petroleum from its order; that it reduced the prescribed differentials on grain from 5 to 2 cents from Texas, from 3 to 1 cents from Kansas, and from 4 to 1 and 2 cents from Oklahoma; that it cut down the differentials on cottonseed cake and meal, cottonseed oil, packing-house products, soap, and bagging and

ties; and that it retained the differential of 9 cents on green coffee.[30] It is clear that the Commission's purpose in reducing the differentials to New Orleans was to give additional recognition to those interests that would be aided by the reduction, including competitive interests of carriers.

Concerning the fact that the Commission made no finding that the preferential rates to New Orleans were so low as to cast a burden on other traffic, it has been settled by this Court that rates may cause undue prejudice even though the prejudicial rates are inherently reasonable and the preferential rates not shown to be unreasonably low. *United States* v. *Ill. Cent. R. R.*, 263 U. S. 515, 524; *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624; *Int. Com. Com.* v. *B. & O. R. R.*, 145 U. S. 263, 277.

As observed by appellants, the Commission in its first report said:

> There is no evidence upon this record tending to show that any of the present rates to New Orleans are so low as to throw a burden upon other traffic. (R. 3353.)

At the further hearings appellant carriers introduced additional evidence as to costs. In its second report the Commission made an analysis of this evidence, which appeared to show that certain

[30] Comparison of differentials prescribed by first report (R. 3362) with those prescribed by second report (R. 3417).

traffic was carried at less than "costs," following which it said:

> * * * These results are at best only approximations, but they serve at least to cast considerable doubt upon the wisdom from a revenue standpoint of the unrestricted policy of equalization followed by the Texas & Pacific. (R. 3406, 3407.)

It is clear from the above statement that, in balancing the injury to the Texas ports against the interest of appellant carriers, the Commission had in mind that gross revenue on said traffic did not, in view of the subnormal rates that had had to be charged to secure the traffic, afford a normal picture of net revenue. And corroborating this, consideration of the large differences maintained by the carriers in domestic rates from the same points to the respective ports of New Orleans and Galveston (set forth in exhibits hereinafter referred to) show that appellant carriers' interest in continuing equalized rates over their long-haul routes to New Orleans from this territory from 25 per cent to 68 per cent nearer Galveston than New Orleans is not measurable in terms of gross traffic, as secured by those low rates. And, as above said, under a statute which declares it to be unlawful for any carrier to subject a locality to undue or unreasonable prejudice, the self-interest of the carrier can not be said to render the prejudice due and reasonable with-

out any regard whatsoever for the interests of the locality.

(1) Whenever carriers assert their competitive needs as justification for discrimination the evidence is in excuse for departures from the transportation measure as balanced against evidence of injury to the person or locality

It is important to keep in mind that whenever carriers assert their competitive needs as justification for discrimination a part of the evidence upon which the Commission acts is necessarily evidence in excuse for departures from the transportation measure, as balanced against evidence of injury caused the prejudiced locality by the departure. This situation obtains not only in respect of the ports and foreign and coastwise traffic, but in every case where the Commission endeavors to give due and reasonable consideration to a carrier's competitive needs as justifying the giving of preference while not losing sight of the injury that may be caused the locality discriminated against. Such departures as may be permitted, however, are in a direction that leaves the preferred locality with a transportation advantage and the prejudiced locality at a transportation disadvantage. There is the alternative of holding the carriers strictly to the transportation standard. However, that would be to ignore the carriers' competitive needs, as also the general public good. *Import Rate Case,*

supra; Int. Com. Com. v. *Ala. Midland Ry., supra.* But, if the carriers' competitive interest justifies a broader construction (and it has been held that it does and should) still it must be kept in mind that the prejudiced locality is the sufferer and that, therefore, the carriers must make showing of what is their compelling need and the locality must be permitted to show its injury, for, otherwise, it may be destroyed in its every interest, transportation, commercial or industrial. And, as heretofore said, departure from the transportation standard, in whatsoever degree permitted by the Commission in the carriers' interest, still leaves the preferred locality with a transportaion advantage and the prejudiced locality at a transportation disadvantage.

In the present case the preference and prejudice, as established by the transportation standard of costs and values, was as definite and certain as it could ever be in any case; for the transportation was of like kind of traffic, transportation conditions were found to be substantially similar, and, as taking care of lack of precise mathematical certainty, the differentials prescribed apply only for disparity in distance of 25 per cent and ranging upward from that percentage. So that the Commission's action was simply to give recognition to the fact that not every preference and prejudice is made unlawful by the statute, but only such as are

found to be unreasonable or undue. In short, in line with this court's decisions and the plain intent of the statute, it relaxed requirement of rigid observance of absolute equality to the end of doing justice to the competitive needs of the carriers and interests served by the carriers' rate concessions, but at the same time weighing those interests against the injury to the ports discriminated against.

The arguments for justification *in law* of the equalized rates, whatsoever the angle taken, all would either lead to the exclusion of the ports altogether from Section 3 on this traffic, or they depend for such justification on consideration only of the preferred interests. There is argument that the equalized rates not only are necessary to enable the carriers to share in the business from the origins in question, but that they also benefit the producer at such origins by giving him a choice of ports at equal rates. Such choice of ports at equal rates undoubtedly is an immediate advantage, and yet the ultimate interests of producers at origins near Galveston can not be entirely separated from the interests of that port.

The very giving of the preferences by the carriers means that the preferred point was advantaged. And, concerning the interior origins, their interests in a choice of ports at equal rates, despite differences in distance ranging upward from 25 per cent, must be classed also with the preferred in-

terests. But to urge that the competitive interests of the carriers causing the preference and prejudice, coupled with the interests benefited by that preference, constitute justification in law, is to urge that the undue or unreasonable preference and prejudice prohibited by law becomes due and reasonable, if it appears to be so from the standpoint of the carriers and of those interests which are preferred, without need for giving consideration to the interests of the prejudiced locality.

As often said by this Court, every preference or prejudice is not necessarily undue or unreasonable (*Import Rate Case, supra,* 219, 220; *Nashville Ry.* v. *Tennessee,* 262 U. S. 318, 322); that is to say, even after the rates are shown by the transportation measure to cause preference and prejudice, still because of the qualifying words "undue or unreasonable" it remains for the administrative body to balance and weigh all interests before declaring the discrimination to be unlawful. But appellants' construction, which would make the self-interest of the carriers committing the discrimination and those interests which would be benefited thereby determinative of whether the discrimination was unlawful, would give to the qualifying words "undue or unreasonable" a meaning which would altogether nullify the remedial purpose of section 3. Compare *Spokane & Inland R. R.* v. *U. S.,* 241 U. S. 344, 350; *Piedmont & Northern Ry. Co.* v. *I. C. C. et al.,* 286 U. S. 299.

II. THE COMMISSION'S ACTION WAS TAKEN SOLELY IN THE EXERCISE OF ITS POWER TO REGULATE RATES

Appellants assert that the Commission's action was an attempt to extend its powers beyond its field of regulating transportation charges and to invade the field of industrial and economic conditions. Another contention of appellants, already discussed, is that the Commission confined itself too closely to the transportation standard of cost and value of the services in disregard of the fact that the competitive situation surrounding export and import traffic was the moving cause for the preference given New Orleans.

The Commission's order does not operate in the territory nearer New Orleans than Galveston. New Orleans is left with its lower rates from and to origins in that territory. From and to origins up to 25 per cent nearer Galveston it is left with equalized rates and from and to origins still nearer Galveston the differentials prescribed are most moderate judged by the transportation measure.

All that is taken from New Orleans is the unjust aid of equalized rates from territory much nearer its rival port. It is still left free to compete for traffic in that territory, under a fair and just rate structure, and in doing so to use all advantages which it possesses, either natural or acquired.

III. THE COMMISSION'S FINDING OF UNDUE PREFERENCE AND PREJUDICE IS SUPPORTED BY A FULL RECORD

Because of the various interests involved in this case the concrete situation confronting the Commission and the manner in which it was handled should be kept in the foreground. From and to points much nearer the Texas ports than New Orleans rates to and from New Orleans were being maintained the same as, and in many instances even lower than, the rates to and from Galveston and other Texas ports taking Galveston rates. From representative interior points in the affected territory the average distances (short line) to New Orleans exceed those to Galveston to the extent shown in the following statement taken from the Commission's report on further hearing:

> From Southern Kansas to New Orleans, 898 miles, to Galveston, 755 miles, difference 143 miles; excluding points in equalized territory, 930 and 768 miles, respectively, difference 162 miles.
>
> From Oklahoma to New Orleans, 691 miles, to Galveston, 545 miles, difference 146 miles; excluding points in equalized territory, 720 and 546 miles, respectively, difference 174 miles.
>
> From northern Texas to New Orleans, 644 miles, to Galveston, 444 miles, difference 200 miles; excluding points in equalized territory, 670 and 457 miles, difference 213 miles. (R. 3376–3377.) [31]

[31] Among others see Ex. A–269, So. Kas.; Ex. A–94, Okla.; Ex. A–268, Nor. Texas.

Using interior points which figured prominently in the case for the purpose of showing some of the instances of greater differences in distance that entered into the above statement of averages, there are for example: Dallas, whose distance to New Orleans, 488 miles, exceeds that to Galveston, 291 miles, by 67 per cent; Fort Worth, whose distance to New Orleans, 520 miles, exceeds that to Galveston, 308 miles, by 68 per cent; and Waco, whose distance to New Orleans, 533 miles, exceeds that to Galveston, 233 miles, by 128 per cent. R. 2385.)

The Commission's order prescribed rate differentials only in respect of points from which the distance to New Orleans exceeded that to Galveston by more than 25 per cent, thus permitting equalized rates from territory, involving differences in distance of 25 per cent or less.[32]

The undue preference and prejudice in the instant case is that the same rates charged to New Orleans were charged to the Texas ports for lesser service, or conversely stated, that the same rates charged to the Texas ports were charged to New

[32] Of course, if Houston (48 miles north of Galveston) had been used as a basing point instead of Galveston for computing distance, "differential territory" would have been generally widened and territory from which rates to New Orleans were allowed to be the same as to the Texas ports would have been commensurately narrowed. (R. 3348.) Except for petroleum, which was exempted, New Orleans' big competitors among the Texas ports were Houston and Galveston.

Orleans for greater service. In its first report on further hearing the Commission said:

> No witness seriously questioned the finding first made in *Memphis-Southwestern Investigation*, 55 I. C. C. 515, 523, and since consistently adhered to by us, that the transportation conditions throughout Oklahoma, Arkansas, Louisiana west of the Mississippi River, and Texas common-point territory are substantially the same.[33] The transportation conditions in southern Kansas are at least as favorable as those in the other portions of the Southwest just referred to. With these findings as a base, it must follow, unless special circumstances exist with respect to particular commodities, that the differences in distance between the average hauls to the respective ports must approximate the differences in extent and cost of the services rendered by the respective carriers. We say approximate because the differences in volume of traffic and the varying degrees of efficiency in operation and management on the roads forming the various routes between this territory and the Gulf make it impossible, of course, an equality of unit cost on every commodity. Consideration must also be given to the fact that the average haul on equalized traffic is greater to New Orleans than to the Texas ports. (R. 3410.)

[33] Mention of this is also made in the Commission's first report (R. 3352) and in the Examiner's proposed report leading up to the Commission's first report on further hearing, which was served on the carriers. (R. 3508.)

Competent witnesses in the instant case acceded to the findings made in the *Memphis-Southwestern Investigation* and other cases that transportation conditions were substantially the same. (R. 295, 498, 649, 659, 933, 3089, 3129, 3274.) Appellant carriers apparently accept as generally true the finding of the Commission that transportation conditions are substantially the same throughout the territory involved. (Brief, 179, 180.) They are asserting, however, as they did before the Commission, that transportation conditions on their Louisiana division are more favorable than on the rest of their system, particularly as permitting the traffic in question to be regarded as "added" traffic (R. 980, 987) and its cost of handling to be estimated on a so-called out-of-pocket basis. (R. 3410, 3449). That the Commission had before it operating figures from which it could make comparisons of relative transportation costs is shown by the following appearing in the Commission's first report on further hearing:

> The Texas carriers show that the average operating cost, freight proportion, per 1,000 gross-ton miles for the Gulf, Colorado & Sante Fe was $3.46 in 1923 and $3.02 in 1924, for the M. K. T. $3.68 for 1923 and $3.07 for 1924, for the Missouri-Kansas-Texas of Texas $4.07 for 1923 and $3.27 for 1924, and for the Texas & Pacific $4.13 for 1923 and $3.74 for 1924. It will be noted that in both years the average cost of the Texas & Pacific exceeded that of each of the other roads

named. The average cost per 1,000 revenue ton-miles was also greater on the Texas & Pacific than on the other roads in 1923 and 1924, except that in 1923 the figure for the Missouri-Kansas-Texas of Texas exceeded that of the Texas & Pacific. Other exhibits making comparisons of the operations of these same roads show that for the 11 months ended November 30, 1924 and 1925, the number of gross and net tons per train on the Texas & Pacific was less than the number on the other roads; that the average cost of maintenance and operation per 1,000 gross-ton miles was greater on the Texas & Pacific than on the Gulf, Colorado & Santa Fe by 21.1 per cent in 1923, 21.4 per cent in 1924, and 26 per cent in 1925. These and other exhibits point to the conclusion that, differences in lengths of haul considered, and without comparing special service on particular commodities, it costs at least as much per mile to handle tonnage over the Texas & Pacific to New Orleans, or the other Louisiana ports, as it does over the Gulf, Colorado & Santa Fe or the M. K. T. to Galveston or any of the other Texas ports. (R. 3411.)[34]

Referring to a cost study of the Texas & Pacific which was offered to show that its revenue from equalized traffic more than covered the out-of-

[34] Ex's. A–376 to 382 (R. 2258–2271); Ex's. A–45 to 48 (R. 967 to 971); Ex's. A–51 to 56 (R. 1008 to 1016); Ex's. A–59 to 65 (R. 1030–1045); Ex. A–516, 520 (R. 2972, 3002); Ex's. A–68 to 75 (R. 1045–1068); Ex. A–543 (R. 3011–3017).

pocket costs of the "added" service, the Commission said:

> These estimates were arrived at as follows: The Texas & Pacific handled a greater tonnage and its unit cost was greater in 1925 than in 1924; after an adjustment for the additional cost of fuel, the estimated cost of handling the additional traffic in 1925 was ascertained by dividing the excess amount of traffic handled in that year into the average excess unit cost in 1925 over that in 1924. This formula is far from convincing. If it were applied to the Gulf, Colorado & Santa Fe, for example, which handled more tonnage in 1925 than in 1924 but at less unit cost, the indication would be that it handled the additional traffic in 1925 for less than nothing.

In its second report upon further hearing the Commission, after discussion of additional cost computations of the Texas & Pacific and other carriers,[35] reaffirmed its findings that, differences in haul considered but without comparing special services on particular commodities, it costs at least as much per mile to handle tonnage over the Texas & Pacific to New Orleans as it does over the Santa Fe and M. K. T. to the Texas ports, and it added that—

> What has just been said with respect to out-of-pocket costs on the Texas & Pacific ap-

[35] Ex's. B–84 and B–87 (R. 3260–3262); Ex. B–46 (R. 3173); Ex. B–50, 51 (R. 3184–3187); Ex. B–69 to 71 (R. 3231–3285).

plies also to somewhat similar data offered by the Louisiana Railway & Navigation Company. (R. 3448 to 3450.)

With unit transportation costs "at least as much" to New Orleans as to Galveston, it must follow that for distances greater to New Orleans than to Galveston by from 25 to 68 per cent,[36] rates the same to the respective ports are preferential of the one and prejudicial of the other.

There were, too, the numerous exhibits (cumulating with each hearing) comparing domestic rates to New Orleans with those to Galveston.[37] Those rates had probative value for purposes of comparison (*Chic. R. I. & Pac. Ry.* v. *United States,* 274 U. S. 29, 33, 34; *L. & N. R. R.* v. *United States,* 238 U. S. 1, 12; *Virginian Ry.* v. *United States,* 272 U. S. 658) and the marked difference in New Orleans rates over those to Galveston had probative value as showing the substantial preference of New Orleans and prejudice to Galveston resulting from the equalizing of export rates from the same origins. The fact that consideration had to be given to the distinctions between domestic traffic and foreign or coastwise traffic, and to many other

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[36] Sixty-eight per cent was the approximate maximum from important points on the Texas & Pacific (computed from Ex. A–420 shown at R. 2385, and from Ex. B–17, Volume of Special Exhibits), but there were instances of equalized points involved, as to which the difference in distance exceeded that percentage. (Ex. A–420, R. 2385.)

[37] Ex. A–420, R. 2385; Ex. B–17 (Volume of Special Exhibits); Ex. A–422, R. 2338; Ex. A–424, R. 2390; Ex. A–434, R. 2396; Ex. A–435, R. 2398.

elements, did not deprive the exhibits of evidential value.

In short, based on the standard of transportation costs and values (*United States* v. *Ill. Cent. R. R.*, 263 U. S. 515, 524), the record leaves no doubt but that the same (in some instances lower) rates to New Orleans as to Galveston, or conversely stated, the same (in some instances higher) rates to Galveston as to New Orleans from this territory much nearer Galveston than New Orleans have caused very substantial preference and prejudice. And, as above said, unless it be accepted that in the regulation of rail rates on traffic in foreign and coastwise movement, the transportation standard should be displaced by the principle of unrestricted port equalization, thereby denying other ports their natural advantages of proximity to origin territory, it would seem that little other than the discriminatory rate structure pictured in the record is necessary to demonstrate that the preference given New Orleans must have resulted in undue prejudice and injury to Galveston.

However, all matter readily conceivable as in any way bearing on the question whether the rate structure had or had not resulted in injury to the Texas port was placed before the Commission by the adversary parties. The summarizing and weighing of the evidence, both as intended to show and as intended to refute the claim of injury resulting to the Texas ports from the discriminatory rate structure, was thoroughly done by the Commission

and comprehensively set forth in its reports. That the injury to the Texas ports was of substantial and far reaching character can be quickly shown.

It is claimed that any diversion of traffic from Galveston to New Orleans is attributable to the latter's superior drawing power as a port and not to the preferential rate structure. New Orleans is, of course, entitled to compete for traffic from territory, even though more than 25 per cent nearer Galveston, and in doing so to use its superior advantages as a port, whether natural or acquired through progressive enterprise. There is nothing in the Commission's order that denies it that right. But New Orleans is not in addition entitled to the artificial aid of a rate structure which checks the flow of traffic that would go to Galveston under a rate relationship that would recognize the right of each port to substantial equality of treatment. The above was mainly the principle which guided the Commission through the maze of the unusually large record of facts and statistics.

In so far as the feature of injury to the Texas ports is concerned, appellants rely chiefly on the summarization by the Commission in respect of tonnage of all kinds and from all sources passing through the gulf ports, which shows that the Texas ports as a whole have made a favorable showing as compared with New Orleans in the matter of such total tonnage from all sources. (R. 3380 to 3384.) But that is not the important thing pointed to by the Commission. The report states that 93 per

cent of imports in 1924 consisted of petroleum moving from the Mexican fields (R. 3378) and that 91 per cent of the exports consisted of petroleum, sulphur, grain and its products, and cotton (R. 3382). More than half of this grain is accounted for as coming from the Santa Fe and Ft. Worth & Denver City, which do not equalize rates but maintain rates lower to the Texas ports than to New Orleans. (R. 3351.) And petroleum was exempted from the Commission's order—that is, equalization of New Orleans rates with those of the Texas ports was permitted to be continued. But of more significance than these matters was the fact that over 90 per cent of the whole consisted of petroleum, sulphur, grain and its products, and cotton, while, at the same time, the record showed that products going to make up general cargo were produced in Galveston's tributary territory. (R. 3390.)

Excerpts from findings of the Commission, bearing particularly on traffic from the territory here involved and the relationship of rates on that traffic, read as follows:

> * * * For many years, if not since its establishment, as a port, the traffic moving through Galveston, excluding Mexican crude petroleum, which moves largely in private tankers, has consisted largely of export traffic, of which cotton, cottonseed products, and grain and grain products have composed the major portion. Most of this traffic has moved on rates lower to Galveston than to New Or-

leans. * * * The belief was freely expressed by a number of complainant's witnesses experienced in the exportation of traffic through one or more Gulf ports that a complete equalization of rates on all commodities between New Orleans and the Texas ports from and to the affected territory would within a comparatively brief period have the effect of practically closing the Texas ports and diverting the traffic to the Louisiana ports, particularly New Orleans, * * * (R. 3378.) * * * Witnesses for steamship lines serving Galveston expressed confidence that an increase in the volume and variety of general cargo through that port would do much to stimulate its steamship service. Immediately following the original decision herein there was noticeably increased activity on the part of steamship interests at Galveston, and there was in prospect additional steamship service between the Texas ports and various foreign ports, particularly in the Latin America. These activities ceased upon the reopening of this proceeding. (R. 3379.)

* * * * *

* * * Complainant states that many of the commodities which constitute what is termed general cargo for vessels are produced or consumed in the affected territory in sufficient volume to afford the Texas ports a variety of commerce sufficient to attract steamship service, but that these commodities will not move to the Texas ports in substantial quantities unless they are given the

> benefit of a rate differential under New Orleans. Many instances were cited by witnesses for complainant in which export business from points in the affected territory were lost to the Texas ports because of the better and more frequent steamship service at New Orleans, even though the rail haul was shorter to the Texas ports than to New Orleans, where the rate was the same. Exporters and importers testified that they would not locate at any of the Texas ports under an equalization of rates with New Orleans, and at least in one instance an importer abandoned a Texas port and moved to New Orleans, even though the ports were equalized, because of the superior advantages offered by the latter port. (R. 3390.)

The record contains a large amount of testimony, accompanied by documentary evidence, in support of the above statements. The Court is referred to the testimony of Witness Hershey, for 18 years General Freight Agent of the Gulf, Colorado & Sante Fe, which for the first hearing commences at page 616 of the record and for the second hearing at page 2276 of the record. Among other things, Mr. Hershey testified:

> To my mind the very existence of Galveston and the other Texas ports depends absolutely and entirely upon the result of this proceeding now before the Interstate Commerce Commission. * * *
>
> * * * It is my belief that were it not for the fact that the grain from Texas, the

> cotton from Texas, and the wheat from Oklahoma points adjacent to the Santa Fe, moved to Galveston on a lesser rate than is available to New Orleans, there would not be any business at this point. In other words, it is that movement of traffic that attracts the traffic from points where the rates are the same from New Orleans and to Galveston. My belief is that if the rates on the traffic originating in Texas and Oklahoma were the same identical rates to New Orleans as are in effect to Galveston, within a very short period of time Galveston would be abandoned as a port and would not serve the purpose for which this Government expended a great sum of money for the purpose of development. (R. 616, 617.)

And again at the second hearing, Mr. Hershey testified:

> It has been my view for many years that the continued existence of the Texas gulf ports depends completely upon their ability to secure and retain the advantage of their geographic location, and that such advantage must be reflected in the rail rates between such points and interior points, and that the territory to or from which the Texas ports should have such advantage ought to produce and consume a sufficient volume of traffic to at least form a nucleus for a ready and steady flow of tonnage through these ports in both directions.
>
> * * * It is my view that were there a complete equalization of rates to or from

> New Orleans as are in effect to or from Texas ports to or from points in Texas, Oklahoma, and southern Kansas, within a very brief period practically the entire export, import, and coastwise business of these states will be handled through Louisiana ports, and that the investment that has been made in the Texas ports will be completely lost. * * * (P. 2276, 2277.)

Witness Garvin, General Freight Agent of the M. K. T. Railroad, among other things, said:

> I think it has even now gotten to a point where the rates are somewhat unremunerative, for instance, we apply the same grain rates as to Galveston, but after we divide the revenue with our connections the revenue is very thin. * * *
>
> I think the method employed by complainants in determining the proper level of rates is the only proper way of getting at it. I do not believe you can pick out any isolated point and figure that mileage from that point to New Orleans and Galveston and say the rates from both points should be the same. I think the average distance from a group of points to Galveston versus New Orleans should be the method employed. * * * (R. 614, 615.)

Witness Booth, Traffic Manager of the International Great Northern since 1911, among other things, said:

> We do not subscribe to the principle of port equalization where the distances are

> substantially different, for two reasons: First, it takes away from the port or ports more favorably situated the natural advantages to which they are entitled by reason of their geographic location and involves the applicatiton of substantially higher rates, distance considered, to the nearby port as compared with the other port. In my judgment it is discriminatory under Section 3 of the Act; in the second place, it involves wasteful service and places an unnecessary burden upon the transportation system as a whole, which is contrary to that provision of the Interstate Commerce Act with respect to economy of operation. (R. 633.)

Witness Booth then went on to illustrate by stating that average distances on the I. G. N. to New Orleans were approximately 250 per cent of the distance to Galveston; that most rates to Galveston had been fixed by the Commission as reasonable rates for the distance; and that, therefore, the same rates as applied for the much greater distance to New Orleans involved waste. Later on in the course of his testimony Mr. Booth said:

> For a number of years prior to July, 1918, the United Fruit Companies operated regularly into Galveston with cargoes of bananas. During a large part of the time they had about two ships. At that time, as at present, the rates were and are lower from Galveston to Texas points than they were to New Orleans. I have heard the United Fruit Company would resume its operations probably

> through the port of Galveston. Should the New Orleans-Texas line reduce the rate on bananas from New Orleans to Texas points to the same figures as are in effect at Galveston, I am satisfied they would not come into Galveston; there would be no reason for their coming to Galveston. They have their organization in New Orleans and they get cheaper fuel there and can do their business from that port on the same rate more conveniently than from Galveston.

Witness Bowe, General Freight Agent of the Trinity & Brazos Valley Railroad, endorsed generally the principle laid down in the Commission's first report (R. 2415) and, among other things, said:

> The basis for my prediction that if the equalized rates continue as they are now, in ten years Texas ports will have dried up, is because that is the way it has been going for some time.

Theretofore Mr. Bowe had said:

> Yes, sir; this principle of so-called equalization has gotten to such a stage that some lines can not afford to participate in this traffic when you have got to divide it more than once. (R. 2416.)

Witness Thornton, Traffic Manager of the Galveston Commercial Association, pictures very graphically the "effect" which equalization has had on Galveston, and the court is respectfully referred to his testimony commencing at page 289 of the

record, and exhibits therein mentioned. Among other things Mr. Thornton, after specifying the regions from which the same (or lower) rates applied to New Orleans as to Galveston, said:

> As a result Galveston has found it very difficult to compete with the port of New Orleans for much of this foreign and coastwise traffic that originates in the territory tributary to Galveston. Furthermore, New Orleans, with the support of the Texas and Pacific, has been trying for the past twelve months or more to force an equalization with Galveston at practically all other points in Texas where the equalization is now not in force. Galveston therefore finds that it is very difficult to build up any South American or Central American trade on account of the unfavorable rate adjustment to and from Galveston and the undue preference in favor of New Orleans in the rates on many commodities, and it is only with the greatest difficulty that Galveston is able to maintain a steamship service to the West Indies and Mexico on account of this undue preference in favor of New Orleans in the matter of freight rates. Take coffee for an illustration:
>
> We have heretofore found it very difficult to compete with New Orleans in the handling of this important commodity on account of the preferred rate adjustment of New Orleans to the territory tributary to Galveston. * * * However, if Galveston is given benefit of lower rates than applied

from New Orleans on coffee destined to points in Texas, Oklahoma, Kansas, and other western states, where the difference in distance in favor of Galveston justifies a difference in rates; and if equal rates are established from Galveston with New Orleans to points substantially equally distant, the port of Galveston will be able to develop the importation of coffee through this port. We are not now having importation of coffee of any great magnitude. We are gradually trying to build up that trade, but we are restricted at the present time and will be until we get these rates published which we are seeking. * * *

* * * As a result of what we call these preferential rates in favor of New Orleans, Galveston has never been able to handle any export cottonseed oil to any great extent. However, if Galveston is accorded lower rates than New Orleans, commensurate with the difference in distance on cottonseed oil shipped from Texas and Oklahoma, and equal rates with New Orleans from points in Arkansas and Louisiana where the difference in distance justifies equal rates to the two ports, there is no question but that Galveston could develop an export movement of this important commodity. What has been said in respect of coffee and cottonseed oil applies with equal force to other commodities, such as petroleum, packing-house products, etc.

* * * On the other hand, we recognize that New Orleans should be given lower rates

than Galveston where the difference in distance is materially in favor of the Louisiana ports. By adjusting the rates in this manner Galveston could develop a considerable import traffic, which is badly needed by the rail lines serving Galveston in order to balance the export movement through this port. It would also permit us to build up our foreign trade. It would enable Galveston to meet New Orleans competition on export traffic, particularly on general cargo traffic, which would also permit us to build up our foreign trade with South and Central America, Mexico, and the West Indies. It would also enable us to build up our general cargo trade with Europe. And here I might mention that as fast as we develop any import movement of any commodity through Galveston, for example, newsprint paper—we have recently developed a nice little movement of newsprint paper through Galveston—and immediately that developed the New Orleans interests with the support of the Southern Pacific and the Texas Pacific Railway tried to establish rates to points in Texas which are absolutely the same as the rate from Galveston for the purpose of destroying our import traffic. Newsprint paper is simply mentioned for illustration purposes. It is not a question of what the paper rates are, but the custom we are up against.

Witness Torregrossa, Manager of the West Indies Service, Lykes Bros. Steamship Company, Texas Ports, testified very fully as to steamship

conditions at the Texas ports. His testimony commences at page 1904 of the record. Among other things, the witness said:

> Since the decision of this case last July we have given some thought to the establishment of service to Mexico, Central and South America. As to making any plans in that respect, particularly in so far as Cuba is concerned under the recent decision of the Interstate Commerce Commission, we were investigating the resumption of our Cuban service, particularly to Havana, but when the decision was postponed we simply changed our ideas on that. (R. 1906.)

Witness Herrick, Vice President of the Lone Star Steamship Company, Galveston, also testified generally as to the steamship situation at Galveston, commencing at page 1892 of the record. After stating that he was familiar with the Commission's decision in its first report, Mr. Herrick said:

> My line has considered the establishment of additional service to points following the decision in this case. Last November, after the Commission had made the decision in favor of Texas ports, we announced at the Southern Millers' Convention that we were prepared to inaugurate a service at New Mexico, Cuba, and the lesser West Indies, and also to South America. It is not now our purpose to do that. It depends entirely on the rate structure that might be handed down by the Commission. We don't feel that we can go into a steamship business here

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> at the ports I mention unless we could at least have an even break on the business which we are not and can not hope to get under the present situation. With equalized rates from that territory we can have an even break for the business. (R. 1894.)

Witness Hogsett, Manager of the Traffic and Transportation Department of the Houston Chamber of Commerce, gives a complete résumé as to the effect of equalized rates with New Orleans on Houston, accompanied by exhibits. His testimony commences at page 1925 of the record.

Among other witnesses testifying to the difficulties encountered by exporters and importers located at Texas ports there were: Holloman (R. 3120); Sparkes (R. 3133); Davison (R. 2080); Eargle (R. 2056); Stockton (R. 2095); Daugherty (R. 2023); Beveridge (R. 1912); Farga (R. 2018).[38]

The impossibility of determining definitely what proportion of the traffic from this territory would have gone to Galveston under properly related rates is, of course, apparent. But there was the indisputable fact that New Orleans was intensively competing for traffic from this territory, ranging

[38]As particularly bearing on No. 20685, which, as heretofore said (p. 20), was heard together with title case, evidence as to the rate structure described and found unlawful by the Commission (R. 3446, 3456) is shown at pages 3107 to 3111 of the record, and the detriment resulting therefrom appears in testimony of witnesses Geoghagan and Boyd at pages 3053 to 3064 of the Record.

upward from 25 per cent near Galveston, in which effort it was aided by the same rates as (in instances lower rates than) those to Galveston. In addition there was convincing testimony by many competent witnesses that injury had and was resulting to the Texas ports, and there was a great amount of material bearing generally on that question. Certainly there was ample evidence upon which an administrative body could reach a determination; and, moreover, it is difficult to see how the Commission could have arrived at a different decision than it did.

a. The rate differentials named in the Commission's order were for the purpose of removing undue prejudice, and there was ample evidence to enable the Commission to reach its determinations

Appellant, State of Louisiana, in effect asserts that the Commission in naming the differentials as between rates to New Orleans and those to the Texas ports should have proceeded under section 1 as well as under section 3 of the Act; that is, that as a prerequisite to its naming of differentials it must have considered (and presumably made findings) that the differentials when added to the present New Orleans rate would result in reasonable rates. In *American Express Co.* v. *Caldwell,* 244 U. S. 617, Justice Brandeis said, at page 624:

> But the finding that discrimination exists and that the interstate rates are reasonable does not necessarily imply a finding that the

> intrastate rates are unreasonable. Both rates may lie within the zone of reasonableness and yet involve unjust discrimination. *Interstate Commerce Commission* v. *Baltimore & Ohio R. R. Co.,* 145 U. S. 263, 277. Proceedings to remove unjust discrimination are aimed directly only at the *relation of rates.* If in such a proceeding an unreasonable rate is uncovered and that rate made reasonable it is done as a means to the end of removing discrimination. The correction is an incident merely.

In *United States* v. *Illinois Cent. R. R.*, 263 U. S. 515, 524, the rate complained of before the Commission, while found to be unduly prejudicial, was expressly found not to be unreasonable. As to this the court said:

> But the mere fact that the Knoxo rate is inherently reasonable, and that the rate from competing points is not shown to be unreasonably low, does not establish that discrimination is just. Both rates may lie within the zone of reasonableness and yet result in undue prejudice.

To the same effect, *Int. Com. Com.* v. *B. & O. R. R.,* 145 U. S. 263, 277.

That the order in the instant case was "aimed directly only at the relation of rates" is self-evident, since it left with the carriers whether to deduct the differentials from the Texas ports' rates or whether to add them to the New Orleans rates. It is difficult to see how the situation differs in substance

from the usual case permitting of alternative methods of removing discrimination.

The outline of evidence given in the preceding chapter shows that there was ample in the record to enable a rate-making body to determine section 3 differentials. There were the exhibits comparing domestic rates to the respective ports from the same territory on these commodities and on many other commodities. There were numerous exhibits of rates from other territories to other ports. There were cost studies, ton-mile earnings, and car-mile earnings. There were the many elements and considerations placed before the Commission, such as the distinction between foreign and domestic traffic, the capacity of the Texas ports, and other matters affecting interests of carriers and shippers. As was said in *Int. Com. Com.* v. *U. P. R. R.*, 222 U. S. 541, at page 550:

> * * * Still there was in this mass of facts that out of which experts could have named a rate. The law makes the Commission's finding on such facts conclusive.

And in *O'Keefe* v. *United States*, 240 U. S. 294, the opinion reads, at pages 303, 304:

> * * * Nor can it be said that the Commission's action was arbitrary because, while classifying all the service for distances up to 3 miles from junction as switching, and allowing for this a division of $2 and $3 per car, allowances for all distances above 3 miles are based upon mileage. * * *

IV. PLAINTIFFS, THE TEXAS & PACIFIC AND THE L. R. & N., ARE JUST AS MUCH PARTIES TO THE DISCRIMINATION AGAINST THE TEXAS PORTS AS IF THEY REACHED THOSE PREJUDICED LOCALITIES, AS WELL AS THE PREFERRED LOCALITY OF NEW ORLEANS, WITH THEIR OWN LINES

As pointed out in the preliminary statement, the Commission's order of June 29, 1927, exempted points on the lines of the Texas & Pacific and the L. R. & N. from its requirement that differentials be established in the rates to New Orleans over the rates to the Texas ports. The Commission's final order of December 23, 1929, discontinued the exemption and required that the differentials be established from and to points on the Texas & Pacific and the L. R. & N.

The main stem of the Texas & Pacific extends from El Paso, Tex., east through Abilene and Fort Worth, to Marshall, thence southeast to New Orleans. It also has a line extending north to Denison, thence east to Texarkana, whence two lines radiate in a southerly direction and make connections with its main stem, the one at Marshall and the other at Shreveport. The main stem of the L. R. & N. of Texas extends from McKinney, Collin County, Texas (near Dallas and Fort Worth), through Greenville to Shreveport, where it connects with the L. R. & N., which latter extends southeast through Alexandria and Baton Rouge to New Orleans.

While appellants, the Texas & Pacific and the L. R. & N., reach with their own lines only the

Louisiana ports, they participate in through routes and in a full line of joint rates between the Texas ports and both the junction and local points on their lines.[39] (R. 3256, 974–975, 3228, 3452.)

Appellants contend, however, that in order to be guilty of undue prejudice under section 3 a carrier must control the rates both to the prejudiced point and the preferred point.

a. Although the Texas & Pacific and L. R. & N. reach with their own lines only the Louisiana ports, they are effective instruments of discrimination against the Texas ports, and "localities require protection as much from combinations of connecting carriers as from single carriers whose rails reach them"

Section 3 (1) of the Act declares it to be unlawful for any common carrier to cause any undue or unreasonable preference or prejudice—

> to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever.

The court has said that the above "language is certainly sweeping enough to embrace all the dis-

[39] A substantial portion of Texas & Pacific traffic is routed to the Texas ports over the lines of Texas port roads, including the I. G. N., with which it has a traffic arrangement and operates through freight train schedules via Fort Worth and Longview. (T. & P. Witness, R. 974, 975.) The Texas & Pacific has an open route via Fort Worth and the I. G. N. as well as other carriers, "so that they can and do participate in through rates and routes from Sweetwater and other competitive points on its line in Texas, as well as its local points, to the Texas ports." (M.-K.-T. Witness, R. 3256.)

criminations of the sort described which it was within the power of Congress to condemn." (The *Shreveport Case,* 234 U. S. 342, 356); "that the evil of discrimination was the principal thing aimed at" by the Act (idem); and that the purpose of Congress was "to cut up by the roots every form of discrimination, favoritism, and inequality." *Louisville & Nashville Railroad* v. *Mottley,* 219 U. S. 467.

Appellants contend that the method of removing undue preference and prejudice, whether by raising the rates to the preferred locality or by lowering the rates to the prejudiced locality, must be left to the discretion of the carriers, and that, therefore, appellant carriers, the Texas & Pacific and the L. R. & N., could not, in law, be guilty of discrimination from points on their lines to the respective ports because they individually did not control the rates to the prejudiced Texas ports as well as their single-line rates to the preferred port of New Orleans.

Appellant carriers reach with their own lines the favored locality of New Orleans, and, as above shown, they are parties to through routes and joint rates to the prejudiced Texas ports. They could, therefore, acting alone, remove the discrimination by raising their single-line rates to New Orleans. Acting cooperatively with other carriers, they could remove the discrimination by lowering the rates to the Texas ports. That appellant carriers' respon-

sibility for, and ability to remove, the violation of law are altogether sufficient to render valid an order, which necessarily deals with combinations of many carriers, can be readily pointed out.

In *St. Louis, S. W. Ry.* v. *United States,* 245 U. S. 136, there was involved a Commission order requiring, among others, the Cotton Belt, Iron Mountain, and Rock Island railroads, respectively, to establish, either through Cairo, Ill., or Memphis, Tenn., a rate on lumber from points in the southwest to Paducah, Ky., no higher than the rate to Cairo. The Cotton Belt and Iron Mountain hauled Paducah traffic up to Cairo and there turned it over to the Illinois Central for movement to Paducah. The Rock Island's lines reached neither Cairo nor Paducah, but it participated in traffic to both destinations. All three carriers contended that the Commission's order was void because "since their rails did not reach Paducah they could not be guilty of discrimination against that point." The court, in upholding the order, said, at page 144:

> * * * They, however, bill traffic via Cairo or Memphis through to Paducah in connection with the Illinois Central, thus reaching Paducah, although not on their own rails. And, thereby, they became effective instruments of discrimination. Localities require protection as much from combinations of connecting carriers as from single carriers whose "rails" reach them. Clearly the power of Congress and of the Commis-

sion to prevent interstate carriers from practicing discrimination against a particular locality is not confined to those whose rails enter it. *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Interstate Commerce Commission, supra.*

The order involved in the above case was directed against carriers, two of which, similarly as in the instant case, had their own lines and rates to the preferred point, but not to the prejudiced point, and one of which reached with its own lines neither the preferred point nor the prejudiced point, and, therefore, was not responsible for rates to either point except as participating carrier with its connections.

United States v. *Ill. Cent. R. R.*, 263 U. S. 515, involved facts as follows: There was a large territory in Mississippi served by the Illinois Central, its branches and independent connections, from all points within which rates on lumber moving to northern markets were the same, except that from Knoxo, located near the center of the territory and on the Fernwood & Gulf, an independent connection of the Illinois Central, rates were 2 cents per 100 pounds higher. The Swift Lumber Company complained that the rates from Knoxo were unreasonable and unduly prejudicial. The Commission found that the rates were not unreasonable, but that they subjected the Swift Lumber Company to undue prejudice in view of the lower rates ac-

corded competing points within the territory. Its order required the carriers to desist from charging rates higher from Knoxo than from the other points in the territory. The Illinois Central and the Fernwood & Gulf joined in a suit to set aside this order. The court, in upholding the Commission's order, stated and answered the carriers' contentions (here pertinent) as follows (pages 520, 521):

> First, It is contended that the order exceeds the powers of the Commission. The argument is that a carrier can not be held to have participated in an unjust discrimination unless it is a party both to the rate by which a preference has been given to others and to the higher rate which is given to the complainant; that the Fernwood & Gulf did not participate in the discrimination complained of, since it did not join in the lower rates from other points by which the Swift Lumber Company claims to be prejudiced; and hence that it can not be required to cooperate with the Illinois Central in reducing rates from Knoxo, which have been found to be inherently reasonable. That, on the other hand, the Illinois Central can not be held to have subjected the Swift Lumber Company to undue prejudice, since Knoxo is not on its lines and it is not in a position to remove by its own act the discrimination complained of. Neither proposition is sound. Proceedings to remove unjust discrimination are aimed directly

> only at the relation of rates. By joining with the Illinois Central in establishing the prejudicial through rate from Knoxo the Fernwood & Gulf became as much a party to the discrimination practiced as if it had joined also in the lower rates to other points which are alleged to be unduly preferential. Compare *St. Louis Southwestern Ry. Co.* v. *United States,* 245 U. S. 136, 144. If such were not the law, relief on the ground of discrimination could never be had against preferential rates given by a great railway system to points on its own lines which result in undue prejudice to shippers on short lines connecting with it. Moreover, it is not true that the Illinois Central can not remove the discrimination without the cooperation of the Fernwood & Gulf. The order leaves the carriers free to remove the discrimination either by making the Knoxo rate as low as that from Fernwood or by raising the rate from Fernwood, or by giving both an intermediate rate. *American Express Co.* v. *Caldwell,* 244 U. S. 617, 624. The Illinois Central, acting alone, is in a position to raise the rate from Fernwood, for its main line extends from there to the Ohio River Crossings, the rate-breaking point.

It will have been noted that the Fernwood & Gulf was not a party to the rates from the preferred points. But, as said by the Court:

> By joining with the Illinois Central in establishing the prejudicial rate from Knoxo, the Fernwood & Gulf became as

> much a party to the discrimination practiced as if it had joined also in the lower rates to other points which are alleged to be unduly preferential.

And, too, it appears that, in order to be held guilty of discrimination, it is not even necessary that a carrier's participation with connecting carriers be by way of joint rates. A very similar situation to that just above described was involved in the Commission's order which was upheld in *Wyoming Railroad* v. *United States* (heard and decided with the *Illinois Central case, supra*), 263 U. S. 515, 527. There, too, the Wyoming Railroad, which was found guilty of discrimination against points on its line and ordered with other carriers to remove same by charging no higher rates than those maintained from the preferred points (518), did not participate in rates from the preferred points. It was an independent connection of the Burlington Railroad and its participation in rates from the prejudiced points on its line was only by way of its local rate in combination with rates of the Burlington. But by joining in the traffic with the Burlington it became one of a "combination of connecting carriers" causing the discrimination.

It seems clear that the above decisions go much further in holding that any participation by a carrier in discrimination may be reached and removed by the Commission than is necessary in the case of appellant carriers in the instant suit, which reach with their own lines the preferred locality and

which are parties to through routes and point rates [40] to the prejudiced localities.

In *Chicago, I. & L. Ry.* v. *U. S.*, 270 U. S. 287, the Commission had found certain steam roads which served Michigan City guilty of unjust discrimination because, while each maintained reciprocal switching service with the others, such service was denied to the South Shore, an electrically operated railroad. The Erie alone had direct physical connection with the South Shore. In upholding the Commission's order, the court said at pages 292, 293:

> * * * It is argued that, as a matter of law, a carrier can not be guilty of unjust discrimination unless it is able by its own act to remove the inequality; that where there is no direct physical connection with the railroad alleged to be discriminated against, and no joint service is being rendered by the three steam railroads with the South Shore, there can not in law be unjust

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[40] In *Central R. Co. of N. J.* v. *U. S.*, 257 U. S. 247, relied upon by appellants, the Commission had held certain carriers guilty of undue prejudice because they denied the creosoting-in-transit privilege on lumber to a plant located at a point on their lines, while participating in joint rates over routes that passed through the point with other carriers, which latter allowed the privilege to plants on their own lines as an item of their local tariffs. The court set aside the Commission's order. In a footnote to the *Illinois Central Case*, page 520, the court distinguished this case as follows:

"In *Central R. R. Co. of New Jersey* v. *United States*, 257 U. S. 247, the creosoting privilege was not a part of the joint tariff. It was an item in the local tariff granted with-

> discrimination, because the existing inequality can be removed only by the consent of a third party, the intermediate carrier. * * * Unjust discrimination may exist in law as well as in fact, although the injury is inflicted by a railroad which had no such direct connection. Wherever discrimination is in fact practiced, *an order to remove it may issue; and the order may extend to every carrier who participates in inflicting the injury. United States* v. *Pennsylvania R. R. Co.*, 266 U. S. 191, 197–9. * * * (Italics ours.)

In the instant case appellant carriers were solely responsible for their single-line rates to the preferred port of New Orleans. Together with other carriers, they participated in the rates to the prejudiced Texas ports and shared in the revenue. Acting alone, they could remove the discrimination by raising their rates to New Orleans. In the alternative the discrimination could be removed by cooperative action of appellants and other carriers in lowering the rates to the Texas ports. Appellants' argument that alternative operation of the order was ineffective because they, acting alone,

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out the concurrence of the carriers before the Commission; and the revenues derived therefrom were not shared by them."

In the *Chicago, I. & L. Ry. case*, page 293, the court also distinguished the creosoting case, saying:

"* * * There is nothing to the contrary in *Central R. R. Co. of N. J.* v. *United States*, 257 U. S. 247. The relief sought there was denied solely because the Central, although it participated in establishing the through route and joint rate, did not participate in the service which alone was alleged to constitute discrimination. * * *"

could not remove the discrimination by causing the rates to the Texas ports to be reduced, and the other carriers would not voluntarily join with them in such action, is not different in logic than argument that an order establishing reasonable through rates, joint or combination, is ineffective because cooperative action of participating carriers is necessary for compliance.

With all carriers before the Commission necessary to remove the discrimination, whether by raising the New Orleans rates or reducing the Texas ports' rates, it is clear that an order could issue and that it could "extend to every carrier who participates in inflicting the injury."[41]

V. THE INSTANT ORDERS FOR REMOVAL OF UNDUE PREFERENCE AND PREJUDICE UNDER SECTION 3 ARE NOT SHOWN TO BE ARBITRARY AND VOID BY THE FACT THAT CERTAIN ORDERS, GRANTING SO-CALLED FOURTH SECTION RELIEF IN CONNECTION WITH DISTANCE RATES PRESCRIBED IN SEVERAL CASES, PERMIT OF GREATER DIFFERENCES IN DISTANCE THAN 25 PER CENT, IN AUTHORIZING CIRCUITOUS LINES TO MEET THE RATES OF DIRECT LINES BETWEEN COMMON ORIGINS AND DESTINATIONS

Appellants contend that the instant orders for removal of undue preference and prejudice under Section 3 of the Act are inconsistent and arbitrary because certain orders (R. 926, 3412, Exs. A–17 and A–101), granting so-called 4th section relief in connection with rates based on distance scales pre-

[41]Appellant carriers' statement (Br. 95) that the Commission had for 20 years adhered to the doctrine which led it to exempt them from its earlier order is disputed by its decisions reviewed by the court in the above cases.

scribed in several cases on commodities moving in the southwest, permit of greater differences in distance than 25 per cent in authorizing the same rates to be charged over indirect routes as over direct routes between common origins and destinations.

Section 4 of the Act (quoted under "Appendix," *infra*) forbids the charging of more for a shorter than for a longer distance over the same line or route, unless Commission authority therefor is obtained. Where such authority has been sought by circuitous lines to enable them to share with direct lines in traffic from common origins to common destinations it has been quite generally granted. That is, in respect of points from which two or more routes are available, carriers in indirect routes have been permitted to meet the rates of the direct route and to maintain higher rates (when resulting) from intermediate points.[42] The fourth

[42] The section specifies express limitations and exceptions to the Commission's authority which have had to be strictly observed, to wit:

"in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and if a circuitous rail line or route is, because of such circuity, granted authority to meet the charges of a more direct line or route to or from competitive points and to maintain higher charges to or from intermediate points on its line, the authority shall not include intermediate points as to which the haul of the petitioning line or route is not longer than that of the direct line or route between the competitive points; and no such authorization shall be granted on account of merely potential water competition not actually in existence."

section authorizations referred to by appellants are general in scope and are conditioned upon specified maximum circuity limitations, as follows:

> 70 per cent for short-line distances of 500 miles or less, 50 per cent for short-line distances of 1,000 miles and over 500 miles and 33⅓ per cent for short-line distances of over 1,000 miles. (R. 3412.)

In the case of short-line distances of 500 miles, for instance, the above circuity limitations would permit the charging of the short-distance rate over circuitous routes longer by 350 miles. Appellants referred to this in the commission proceeding and pointed to the fact that the differences in distance over the direct routes to New Orleans and those to Galveston from points in the affected territory are generally less than 350 miles.

Even were the considerations entering into the limitations imposed upon circuitous lines in meeting the rates of direct lines between common origins and destinations, while maintaining higher rates from intermediate points, comparable in all respects with those entering into the limitations here imposed upon carriers in equalizing rates to New Orleans with rates to the Texas ports, still "the alleged inconsistency with findings made in other proceedings" would not be relevant to show invalidity of the orders now before this court. *Virginian Ry.* v. *United States,* 272 U. S. 658, 666. But this Court is familiar with the administrative considerations which are peculiar to the granting of 4th section

relief to circuitous lines. In such case the Commission is dealing with identical origins and destinations and when it permits the circuitous line to meet the direct-route rate in order to share in the business from the more distant point and that results in a lesser rate than the rate from an intermediate point on the circuitous line, there is always the fact that the lesser rate than that of the intermediate point is in any event available to the more distant point over its direct route. Such fact does not preclude other considerations. (*Council of Boston, Ga.,* v. *Atl. Coast Line,* 24 I. C. C. 50; *Class and Commodity Rates in the South,* 160 I. C. C. 685, 697), but it is enough to differentiate such 4th section relief from the instant case, where the discrimination is between localities on separate routes, or separate sets of routes, branching out from common origins.

VI. WHILE REGULATION UNDER THE COMMERCE CLAUSE OF THE CONSTITUTION OF RAILROAD RATES TO PORTS OF THE UNITED STATES MAY AFFECT THE PORTS OF ONE STATE MORE THAN THOSE OF ANOTHER, THAT IS NOT THE GIVING OF PREFERENCE WITHIN THE MEANING OF THE CLAUSE OF THE CONSTITUTION THAT "NO PREFERENCE SHALL BE GIVEN BY ANY REGULATION OF COMMERCE OR REVENUE TO THE PORTS OF ONE STATE OVER THOSE OF ANOTHER"

Certain of the appellants make the contention that the prescription by the Commission of differentials as between rates to the Texas ports and those to New Orleans is invalid because of clause 5,

section 9, Article I of the Constitution, which reads as follows:

> No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter or clear or pay duties in another.

The Commission's order is for removal of preference to the port of New Orleans. That it did not, instead, give a preference to ports of Texas seems beyond dispute. From origins not more than 25 per cent more distant from New Orleans than Galveston, New Orleans is allowed parity of rates. Only for differences in distance exceeding that percentage are the moderate rate differentials required. This would not appear to give a preference to the port of New Orleans, either in fact or in law. And, moreover, the "port preference clause" of the Constitution can not be given the construction attributed to it by appellants.

It has long been settled that regulation of commerce under the "commerce clause" of the Constitution, which may have the incidental result of affecting the ports of one state more than those of another, is not the giving of a preference to the ports of one state over those of another within the meaning of the prohibition in the Constitution here invoked by appellants.

In *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U. S. 421, this court held that an act of Congress declaring a bridge over the Ohio River at

Wheeling to be a lawful structure and requiring the officers and crews of vessels navigating the river to regulate their vessels so as not to interfere with the elevation and construction of the bridge was a legitimate exercise of the power of Congress to regulate commerce. In answer to the contention that the bridge would interrupt and delay steamboats at Wheeling, and that that "necessarily would have the effect to stop the trade and business at Wheeling," thereby virtually operating to give a preference to this port over that of Pittsburgh, the Court said at pages 433, 434:

> * * * Conceding all this to be true, a majority of the court are of opinion that the act of Congress is not inconsistent with the clause of the constitution referred to—in other words, that is not giving a preference to the ports of one State over those of another, within the true meaning of that provision. There are many acts of Congress passed in the exercise of this power to regulate commerce, providing for a special advantage to the port or ports of one State, and which very advantage may incidentally operate to the prejudice of the ports in a neighboring State, which have never been supposed to conflict with this limitation upon its power. The improvement of rivers and harbors, the erection of lighthouses, and other facilities of commerce may be referred to as examples. It will not do to say that the exercise of an admitted power of Congress conferred by the constitution is to be withheld if it appears, or can be shown, that

> the effect and operation of the law may incidentally extend beyond the limitation of the power. Upon any such interpretation the principal object of the framers of the instrument in conferring the power would be sacrificed to the subordinate consequences resulting from its exercise.

In *South Carolina* v. *Georgia, et al.*, 93 U. S. 4, the facts, as here pertinent, were that the Savannah River, dividing the States of Georgia and South Carolina, is separated into two channels by an island just above the City of Savannah. In connection with work undertaken pursuant to appropriations made by Congress for the purpose of improving the harbor at Savannah there was built a crib or dam diverting water from the North channel, to the end of increasing the flow of the south channel and the depth of the water at Savannah. One of the contentions of South Carolina was that this contravened the clause of the Constitution here under consideration. At page 13 the court, referring to *Pennsylvania* v. *Wheeling & Belmont Bridge Co., supra*, said:

> * * * The judgment in that case is, also, a sufficient answer to the claim made by the present complainant, that closing the channel on the South Carolina side of Hutchinson's Island is a preference given to the ports of Georgia forbidden by this clause of the Constitution.

In *Armour Packing Co.* v. *United States*, 209 U. S. 56, involving a prosecution under the Elkins Act on account of the receiving of rebates or con-

cessions from published rates, it was, among other things, contended that the Elkins Act violated the clause of the Constitution, here under consideration, because "it gives a distinct preference to those ports which are reached by water as against those which are reached by land." At page 80 the Court said:

> * * * It may be true that the regulation of interstate commerce by rail has the effect to give an advantage to commerce wholly by water and to ports which can be reached by means of inland navigation, but these are natural advantages and are not created by statutory law. The fact that regulation within the acknowledged power of Congress to enact, may affect the ports of one State more than another can not be construed as a violation of this constitutional provision. *South Carolina* v. *Georgia*, 93 U. S. 4, 13; *Pennsylvania* v. *Wheeling & Belmont Bridge Company*, 18 How., 421, 433.

CONCLUSION

The decree of the lower court denying the prayers for injunction and dismissing the petitions for want of equity should be affirmed.

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APPENDIX

STATUTES INVOLVED

Pertinent provisions of the Interstate Commerce Act (24 Stat. 379), as amended by the Transportation Act, 1920 (41 Stat. 456), are:

> SEC. 3 (1). That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. (24 Stat. 379, 380; U. S. C. Title 49, sec. 3 (1).)
>
> SEC. 13 (1). That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer

the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

(2) Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting

orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant. (41 Stat. 484; U. S. C., Title 49, Sec. 13 (1) and (2).

SEC. 15 (1) That whenever, after full hearing upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to

the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(4) In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line), require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established: *Provided,* That in time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest. (41 Stat. 456, 484, 485; U. S. C., Title 49, Sec. 15 (1) and (4).)

SEC. 4 (1) That it shall be unlawful for any common carrier subject to the provisions

of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this Act, but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section; but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and if a circuitous rail line or route is, because of such circuity, granted authority to meet the charges of a more direct line or route to or from competitive points and to maintain higher charges to or from intermediate points on its line, the authority shall not include intermediate points as to which the haul of the petitioning line or route is not longer than that of the direct line or route between the competitive points; and no such authorization shall be granted on account of

> merely potential water competition not actually in existence: * * *. (41 Stat. 480; U. S. C., Title 49, Sec. 4 (1).)

Section 500, Transportation Act, is also involved, and reads:

> It is hereby declared to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation. (41 Stat. 499; U. S. C., Title 49, Sec. 142.)

Clause 5, section 9, Article I, of the Constitution is also involved, and reads as follows:

> No preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State be obliged to enter, clear, or pay Duties in another.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 1.

THE TEXAS AND PACIFIC RAILWAY COMPANY, ET AL.,
Appellants,

v.

THE UNITED STATES OF AMERICA, ET AL.

THE PORT RELATION CASE.

Supplemental Brief on Re-argument as Ordered by the Court, on Behalf of Galveston Chamber of Commerce, Galveston Cotton Exchange and Board of Trade, Houston Chamber of Commerce, Navigation & Canal Commissioners of Harris County, Houston Ship Channel Navigation District of Harris County, Texas, Beaumont Chamber of Commerce, Beaumont Dock & Wharf Commission, Port Arthur Chamber of Commerce & Shipping, Orange Chamber of Commerce, Texas City Board of Trade, The Cooper Grocery Company, The Shear Coffee Company, Waco Coffee Company, Inc., Waco Chamber of Commerce and the State of Texas, Interveners.

STATEMENT.

The above cause was argued at the October term, 1931, following which the court, by order dated May 31, 1932,

restored the cause to the docket for reargument upon the questions involved and in addition thereto invited discussion of the following question, which was raised by the court:

> Whether the respective relations of the Louisiana ports and the Texas ports to the export, import, and coastwise traffic affected, and to the rates condemned, by the orders in controversy are such that the Louisiana ports may be regarded as localities unduly or unreasonably preferred by such rates within the sense and meaning of Sections 3(1) and 15(1) of the Interstate Commerce Act and that the Texas ports may be regarded as localities unduly or unreasonably prejudiced by such rates within the sense and meaning of the same sections.

As above indicated, the question raised by the court had not been raised by any of the parties to the cause and consequently had not been briefed. Also, because of the absence of such a question, there were no citations from the record of the pleadings and evidence which would throw light on the question. It will be the purpose of this brief to direct attention of the court to certain matters in the record which would indicate that the issues are broader than the mere question of considering the effect of a rate preference upon a port, as such, and the jurisdiction of the Commission to correct it, if the preference is found to be undue and to the prejudice of other ports.

Upon the other questions involved, these interveners rely upon the matters presented to the court in the supplemental brief for the appellees, as well as the original brief heretofore filed by these interveners. It will be the purpose of this brief to supplement some of the points discussed in the supplemental brief of appellees and to emphasize certain primary propositions.

STATUTES INVOLVED.

The appendix to the supplemental brief for appellees recites the statutes involved and they will not be here repeated.

NATURE OF THE PROCEEDING.

A rather detailed account of the proceedings before the Commission is set forth in the supplemental brief of appellees. Summarized, they involve the expression of administrative judgment of the Commission upon the complaint of commercial, shipping and general public interests at various Texas port cities against all of the railways in the Southwest and in the Mississippi valley (hereinafter referred to as carriers), alleging that the carriers published a general system of rates on export and import traffic* to and from the port of New Orleans, Louisiana, and the ports of Galveston, Houston, Texas City, Beaumont, Port Arthur, and Orange, Texas, which unduly prefer the shippers, commercial and other interests in the locality of New Orleans, and unjustly discriminate against the Texas localities and the individuals, firms and corporations located at the latter. The complaint alleged violation of Section 3 (1) and asked for relief to be accorded under the powers granted the Commission in Section 15 (1). Numerous shippers and organizations of shippers, including important interior interests in the Southwest, as well as some public bodies intervened in support of the complaint; and, contra, numerous other interests opposed the complaint, chief among them being the shippers' organizations and other commercial and shipping interests located at New Orleans. In other words, both private shipping and public interests, located both at the ports and in the interior, were arrayed on both sides of the controversy and presented their respective contentions and exhibited the nature of their interest therein.

*The complaint also involved coastwise domestic rates where no through rates were published but this feature was of minor importance.

The hearings were begun in 1922 and, after voluminous testimony had been taken, the case was argued, briefed, submitted, and finally decided by Division 2 of the Commission June 24, 1925, the Commission finding that the carriers were violating Section 3 and prescribed certain differentials to be observed in the rates on certain commodities moving in export, import and coastwise traffic to and from interior points in the Southwest which were in excess of one hundred miles farther from New Orleans than from Galveston (one of the Texas ports).

This order never became effective. The Texas & Pacific Railway and the Louisiana Railway & Navigation Company (now the Louisiana & Arkansas Railway) together with various shipper and port interests, including the New Orleans port interests, petitioned for a reopening of the cause and for further hearings, contending, among other things, that a more complete record should be made, changes in conditions should be determined, and that equalization should be permitted to a greater extent than provided in the order and that, even if differentials be required, the differentials were so high as to prevent the shippers and other interests at the port of New Orleans from participating in the traffic and the carriers serving New Orleans from transportation of the same from differential territory.

The Commission reopened the case and extensive hearings were held upon all of the issues involved and, after further briefs and arguments, a decision and order was rendered by the entire Commission on June 29, 1927, in which the Commission eliminated the finding of undue prejudice as to certain commodities, substantially enlarged the territory in which the carriers would be permitted to equalize New Orleans with the nearer Texas ports, and substantially reduced the differentials which it had previously prescribed.

Thereafter, upon application of certain parties, the case was further reopened, particularly with reference to the extent to which the Texas & Pacific and the Louisiana Rail-

way & Navigation Companies (appellants herein) should be made subject to the order. In the meantime all of the carriers in the Southwest published tariffs to become effective December 12, 1927, in compliance with the findings and orders of the Commission, and the appellant railways were among those carriers which published tariffs reflecting the differentials prescribed. The order of June 29, 1927, with which appellants complied, is now attacked by them and the court has been asked to enjoin the enforcement of such order.

Upon further hearing the Commission made its third report and order on December 23, 1929, and at the same time made its report and order in I. C. C. Docket 20685 involving the complaint of the Cooper Grocery Company, et al. vs. Angelina & Neches River Railroad Company, et al., which had been consolidated with the general proceeding. Prior to the effective date of the orders of December 23, 1929, the appellants filed their complaint seeking to enjoin the enforcement not only of the orders which had not become effective, but also the order of June 29, 1927, which had been in effect for more than two years.

The attention of the court is respectfully directed to the fact that the main order under attack in this case is the order of June 29, 1927, which was complied with by the tariffs filed to become effective December 12, 1927. This order excepted from the finding of undue prejudice the rates on all commodities involved, moving from or to points on the lines of the Texas & Pacific Railway and Louisiana Railway & Navigation Company and its subsidiary. It will be observed that even these lines were not exempted from the scope of the order on traffic which originated in the interior at points on other lines or was destined to interior points on other lines. In such case the appellants were under the obligation of the order to refrain from participating in the condemned rates and, as a matter of fact, filed tariffs under which they participated in the differential

rates in compliance with the order where the traffic moved to or from such other points.

The orders of 1929 were based upon the order of April 2, 1928, reopening the case (R. 3437). This order was limited to the issues, first, as to whether or not the Texas & Pacific was controlled by the Missouri Pacific Railway Company; second, whether or not the Texas & Pacific Railway should be exempted from the finding of undue prejudice to the extent exempted in the order of June 29, 1927; and, third, whether or not certain short lines in Texas, which were controlled by the Texas & Pacific Railway, should also be exempted from said prior order to the same extent. Only to the limited extent here shown could it be said that the proceeding was reopened, but, on the other hand, the order of June 29, 1927, remained in full force and effect.

SUMMARY OF ARGUMENT.

1. The provisions of Section 3, paragraph 1 of the Interstate Commerce Act, making it unlawful for any common carrier subject to the Act to give any undue preference or advantage to any "locality, or any particular description of traffic, in any respect whatsoever," or to subject the same to any undue or any unreasonable prejudice or disadvantage, "in any respect whatsoever," were intended to apply to ports and to shippers engaged at such ports in export, import and coastwise commerce. In the absence of some affirmative evidence of a contrary intention, the court should find that the very broad prohibitions were not intended to make an exception of any character of locality or any particular description of traffic to the extent that the movement of such commerce occurred upon the line of common carriers subject to the Act.

2. The issues in the proceeding before the Commission were not restricted to the ports as such, but embraced exporters, importers, and persons shipping and receiving

freight moving in export, import and coastwise commerce to and from such ports, as well as all of the other interests incident to the movement of such commerce and which were entitled to the protection of Section 3, paragraph 1.

3. The ports are not mere way-stations as to traffic handled by them, but the persons affected by the traffic involved, including the shippers, receivers and the public at large, have a substantial interest in obtaining reasonable, just and non-discriminatory rail rates upon the traffic moving to and from such ports. Certainly such communities, as to traffic which does not move through them on through joint rates, are entitled to be considered as localities within the purview of the act.

4. For more than thirty years the Interstate Commerce Commission has consistently construed Section 3 (1) of the Act as embracing ports and the export, import and coastwise traffic moving to and from such ports. During this period reenactment of portions of the Interstate Commerce Act and additions thereto, by the Hepburn Act in 1906, the Elkins Act in 1910, and the Transportation Act in 1920, have been tantamount to Congressional adoption of the settled construction made by the Commission. The policy of Congress with respect to the ports, as outlined in the Transportation Act of 1920, the Merchant Marine Act of 1920, and in its action in establishing the several ports has further confirmed the intent to protect such ports as localities against unjust discriminations by common carriers serving such ports.

5. There is a limit beyond which carriers subject to the act may not go in extending preferential rates to one port and the shippers thereat over another port, to and from which competitive traffic is moving over the lines of such carriers, and the Interstate Commerce Commission is clothed with the authority to determine such limit. The

determination of such preference or discrimination is a question of fact. The determination of whether it is undue or unjust is also a question of fact, and, so long as the findings of the Commission thereon are supported by substantial evidence, the courts will not disturb such findings nor substitute their judgment for that of the Commission. All interests before the Commission agreed that a line should be drawn somewhere as a limitation upon the power of the carriers to ignore the benefits of the natural location of a port in the rate adjustment applicable to it and competing for it.[1]

6. The appellant carriers participate in the through rates to and from all of the ports involved, and, to the extent that such rates were unduly preferential to New Orleans or unjustly prejudicial to the Texas ports, such transportation affords a proper and sufficient legal basis for the order directing appellants to remove the undue prejudice and preference.

7. The Missouri Pacific Railway Company controlled seventy per cent of the voting stock of the appellant, Texas & Pacific Railway, and all of the stock of the International Great Northern Railroad Company with which appellant Texas & Pacific joined in through rates to and from the Texas ports upon the traffic involved. Through the common control by the Missouri Pacific the joint participation of such carriers in both the preferential and prejudicial rates constitutes, *per se*, sufficient legal basis for the order of the Commission requiring the entire group of affiliated carriers to remove the undue preference and the unjust discrimination.

8. The evidence before the Commission showed that the carriers were extending rates actually and relatively lower

[1] This point was dealt with at pages 10 to 31 of the original brief of these interveners and is not discussed in this supplemental brief.

to New Orleans on commodities moving for export beyond and from New Orleans on imports received thereat (as well as on coastwise traffis where no through rates were in effect) than were accorded to the Texas ports. For example, on export traffic moving to and from interior Texas, Oklahoma and Kansas, the New Orleans rates were generally as low as, and in many instances lower than, the rates accorded to Texas ports, although the Texas ports were much nearer and the average service was much less. From the territory in the extreme eastern portions of Texas, Oklahoma and Kansas, and from Missouri, Arkansas and Louisiana, where the relative distances to the respective groups of ports were approximately the same, the rates were generally substantially lower to New Orleans than to the Texas ports. From the territory in the Mississippi valley, embracing eastern Louisiana, Mississippi, Alabama, Tennessee, eastern Arkansas, Kentucky, and eastern Missouri, the New Orleans rates were materially lower than those accorded the Texas ports. The general policy of appellant carriers was to publish rates to New Orleans in all instances which would be as low or lower than those which they published with their connecting carriers for application to the Texas ports, irrespective of the difference in the service performed.

9. The ocean rates on the traffic involved bear no necessary relation to the rail rates applicable to and from the ports. Because of its superior advantages, due in part to its location and due in part to the rate adjustment, the port of New Orleans enjoyed a much more complete line of sailings and afforded the shippers greater opportunities for more favorable rates and sailings than could be secured at the Texas ports. In so far as such advantages result from preferential rate adjustments, they are entitled to be considered by the Commission to determine whether the preference be undue and to determine the discrimination against and injury to the Texas ports and the exporters,

importers and other shippers located at such ports. The contention of the appellants, that the rail rates were equalized and that the water rates beyond the ports were likewise equalized, is not supported either by the evidence or the findings of the Commission. But the Commission was entitled to give consideration to the fact that the commerce moved beyond the ports and did give consideration to this in its decision.

10. The effect of the rate adjustment was to accord undue preferences to New Orleans and the shippers at that port and to discriminate unjustly against the Texas ports and the shippers located at those ports. The unequal rate adjustment operated greatly to the injury of the Texas ports and the shippers at such ports, and deprived those ports of the benefits of their geographical location, thereby preventing them from developing a general cargo traffic in the commerce involved in the investigation.[2]

11. The Commission made its findings and orders in which it fixed a limit upon the extent to which the carriers could extend a preference to the port of New Orleans and the shippers thereat, but nevertheless still left a wide range of discretion to the carriers in which they might extend preferences to New Orleans and the shippers thereat because of the nature and character of the commerce involved.

12. The findings and order of the Commission are fully supported by substantial evidence and demonstrate a judicious use of its discretionary power. The Commission carefully considered the conditions applicable to each commodity involved, having first fixed certain differentials for application where the distance to New Orleans was in excess of a hundred miles greater than the distance to Galveston, one of the more distant Texas ports; but, upon

[2] See pages 21 to 31 of original brief of these interveners.

reconsideration, materially restricted the territory where differentials should be required, substantially reduced the differentials on some commodities and found that as to certain other commodities no undue preference or unjust discrimination had been shown. The mere fact that the Commission reached a different conclusion with respect to one commodity than that reached with respect to others is no proof of the exercise of any arbitrary power, but reflects the difference in the conditions surrounding the movement of each commodity as shown by the evidence. The Commission was undertaking to prevent the carriers from depriving the Texas ports of all of the benefit of their natural advantages of location and, at the same time, was undertaking to fix such differentials as would enable appellants and other carriers to continue to participate in the movement of commerce to all of the ports involved. The exercise of its judgment on these matters will not be interfered with by the courts, unless the action is taken without any factual basis in the record which it considered.

13. The mere fact that the Commission has fixed a different standard in other cases involving only the Fourth Section of the Interstate Commerce Act is no ground for concluding that its findings of undue preference and unjust discrimination under the Third Section constitute an arbitrary exercise of power. The Fourth Section of the Act involves a different situation and different issues than those involved in the instant case and, in the administration of the Fourth Section, the Commission must act upon the facts peculiar to the particular cases before it. Also, in administering the Third Section of the Act, the Commission must act in each case upon the peculiar facts and circumstances presented to it upon that issue. The Third Section involves primarily competition between persons, firms, corporations and localities affected by competitive traffic in a given commodity, while the Fourth Section

deals primarily with competition between carriers and the extent to which points intermediate between the origin and destination of a movement, wholly within the jurisdiction of the Commission, may be entitled to the benefit of the rates provided for longer hauls embracing the shorter hauls to and from such intermediate communities.

14. The Commission did not ignore the interests of interior shippers, but on the contrary its action in ordering the undue prejudice removed was widely supported by such shippers whose interests were served by the consequent reductions to the Texas ports.

15. The order and findings of the Commission in Docket 20685 are supported by substantial evidence and the appellant carriers can be legally required to remove the undue prejudice and preference therein found to exist.

I.

The Relations of the Respective Ports to the Export, Import and Coastwise Traffic Affected by the Orders in Controversy Are Such That They May be Regarded as Localities Within the Sense and Meaning of Sections 3(1) and 15(1) of the Interstate Commerce Act and Are Entitled to be Protected Against Unjust Discrimination as Prohibited by the Act.

a. The issues are not restricted to ports as such but embrace persons, firms and corporations shipping and receiving freight at or through the ports as well as the other interests affected by the commerce involved.

In view of the question to which the court directed the attention of counsel, we wish to emphasize the fact that the complaint instituting the proceeding before the Commission was not brought solely in the interest of Galveston as a port. It expressly included the individual shipper members of the Galveston Commercial Association, and

throughout the proceeding, and in the Commission's decisions and orders the term "Galveston, Texas and other Texas ports" has included these individual shippers. The term "port" has been commonly used throughout this proceeding to cover all such port interests.

That the complaint was on behalf of these shippers is plain from first report of the Commission where it is stated "Complainant, *on behalf of the commercial and shipping interests of Galveston, Tex.*," (Record 3348) brought the complaint which started this proceeding. This is further shown by Paragraphs II and XI of the original complaint which read as follows:

> "That various individuals, firms and corporations are engaged in shipping various commodities to, from and through the port of Galveston in interstate and foreign commerce via the lines of the defendants above named and certain of such (fol. 5201b-7) individuals, firms and corporations are members of Complainant and Complainant is duly authorized to represent their interest in respect to the matters herein complained of, such persons being herein referred to as individual shippers." (Record 3206.)

> "That by reason of the facts stated in the foregoing paragraphs, complainant and individual members thereof, have been subjected to the payment of rates which are unjust and unreasonable and in violation of Section 1 of the Interstate (fol. 5201b-3) Commerce Act and unjustly discriminatory and unduly prejudicial in violation of Sections 2 and 3 thereof." (Record 3312.)

Paragraph II of the amended complaint (Record 3319) and of the "amended complaint corrected" is exactly the same as that paragraph of the original complaint. Paragraph V of the amended complaint reads:

> "That the application of the present rates to and from shipside Galveston, Texas, on the articles men-

tioned in Paragraph IV hereof by said Defendants are unjustly discriminatory against the Port of Galveston and the *individual shippers using* this port and unduly preferential in favor of New Orleans, Louisiana, and its sub-ports, as well as other Gulf ports and individual shippers using said ports, and in violation of Sections 2 and 3 of the Act to Regulate Commerce." (Record 3320)

Paragraph XII of the amended complaint and Paragraph XI of the amended complaint corrected are also identical to Paragraph XI of the original.

Paragraph V(b) of the amended complaint corrected is also revelant to show the participation of individual shippers in the complaint:

"(b) That the application of the present export, import and coastwise rates and shipside rates on the Articles and Related Articles named and referred to in Section IV hereof (the Articles and Related Articles are not named here for the purpose of avoiding repetition) are unduly and unjustly prejudicial to any firm, corporation, or individual shipper or consignee, who desires to receive, forward, transport or ship his export, import and coastwise traffic via Galveston in competition with other firms, corporations or individual shippers or consignees, who receive, forward, transport, or ship their import and coastwise traffic at or from the same or different points of origin or destination via New Orleans, La., Mobile, Ala., and other Gulf Ports named in paragraph (a) of this Section V, in violation of (fol. 5201e-10) Section III of the Act to Regulate Commerce. Admittedly the 'desire of the shipper or consignee' does not constitute the prejudice alluded to, but, the fact that the Port of Galveston is subjected to undue and unreasonable prejudice certainly can and does cause a serious disadvantage to firms, corporations and individual shippers whose shipping or receiving points may be and are so situated (geographically and from the point of rail service) as to make the forwarding, receiving, transporting or shipping of their goods (articles named in Section IV

are not here named for the purpose of avoiding repetition) via the Port of Galveston, Texas, more desirable than via any one or all of the other Ports named in paragraph (a) of this Section V (names of the other ports not shown here for the purpose of avoiding repetition). In so far as these firms, corporations and individual shippers and consignees are concerned the prejudice alluded to in connection with Section III of the Act might also properly be considered a 'serious drawback' in violation of Section II of the Act; however, no firms, corporations or individuals, other than those who are members of this Complainant, are parties to this complaint, and this paragraph (b) of Section V is included herein for the express purpose of allowing any and all firms, corporations and individuals who so desire to intervene in this complaint without broadening the issues." (Record 3334-5)

b. The orders of the Commission protect not only the Texas ports but shippers engaged in export and import commerce at the ports whose relation to this commerce entitles them as well as the ports to the protection of section 3(1) and section 15(1) and in so far as the commerce involved is concerned the ports are not mere way-stations.

While it is the position of these interests that the term "locality" has a much wider meaning, certainly, it must be construed to include the common interests of persons, firms and corporations bearing the relation of shippers or dealers in the commerce involved at the particular locality. Particularly is this true where the traffic is not moving directly through on through joint rates but is handled in and out of the port upon independent and unrelated transportation contracts.

This court well knows the character of chambers of commerce and similar organizations. For many years the established practice before the Commission has made such organizations the chief vehicle for representing the common interests of shippers doing business at a particular locality and for the protection of the interests of such shippers

against the discriminations prohibited by the Interstate Commerce Act. The original complaint below was brought before the Commission by the Galveston Commercial Association.

The Houston Chamber of Commerce, the Texas City Board of Trade, the Beaumont Chamber of Commerce, the Port Arthur Chamber of Commerce & Shipping, and the various port authorities of the ports intervened in support of the complaint.

An understanding of the reasons prompting these commercial organizations to bring this complaint and to fight it so bitterly can be gained only from a clear perception of the nature of the rates in controversy.

The rates in controversy are not *through joint* rates applying between an interior point in the United States and a point in some foreign country. They are rates from and to the ports as points of origin and destination. There are no contractual relations between the rail lines and the steamship lines, and the water movement may be by tramp steamer or by a conference or independent line, this being entirely in the control of the shipper.

The *physical* movement of the exported commodities by rail to the ports and thence by water or the movement by water to the ports and then by rail to an interior point on imports is not a continuous movement except for the necessary physical transfer from car to vessel or from vessel to car. The necessity of making that transfer offers the opportunity for the performance of a great many operations, and furnishes the reason for the existence of the industries which have made ports the great cities of the world.

The great extension of transit arrangements by rail carriers, and their willingness to apply export or import rates after transit for periods as long or longer than twelve months has also contributed to the location at the ports of most of the shippers engaged in export and import trade.

Over 400 organizations are so engaged at New Orleans and the situation is similar at other ports. The testimony shows, too, that Houston interests are responsible for 90 to 95 per cent of the imports and exports through that port. (Record 1931.)

Obviously, the rate to the different ports is an important factor in determining whether an exporter at Galveston or an exporter at New Orleans will buy or sell a particular commodity. Interior exporters have extensive arrangements at one port which make it impossible for them to use another.

An idea of the shippers located at the ports who are back of the complaint of the commercial organization can be gained from an analysis of the services performed at the ports on the different products which will be shown by the testimony we shall quote in Appendix I. But in summary these services are as follows:

(1) Grain is inspected, weighed, cleaned, conditioned, scoured, mixed, clipped, and stored. Every physical service necessary to its export or marketing in this country is performed in the elevator at the respective ports. It may even be ground into flour.

(2) Crude cotton seed oil is refined, transited, stored, and barreled, and in some cases solidified, by exporters having the refineries located at the respective ports.

(3) Cotton seed cake is stored, ground and otherwise converted by exporters at the respective ports.

(4) Coffee is stored, blended and mixed for shipment in the cars.

(5) Rice is milled, stored, and exported by rice mills at Houston in competition with those at New Orleans.

(6) Bagging is imported, manufactured and shipped out in mixed carloads with ties and buckles by importers located at the respective ports.

In order that the court may have before it in concise form the evidence showing both the shippers located at the

ports and their relation to the traffic, is summarized in Appendix I, page 88.

It may be stated that in so far as the commodities involved in this case are concerned the complainants represented organizations which have every possible relationship as shippers, exporters, importers, manufacturers, and processors which could exist at any other locality. If Section 3 is to have any meaning, it must be held to cover these interests who have in effect brought a joint complaint through the commercial organizations of which they are members.

This court recognized in *Merchants Warehouse Company v. United States*, 283 U. S. 501, that "persons" entitled to protection of the Interstate Commerce Act included "warehouses." It said:

> "Only a word need be said of the objection that appellants and their competitors are not shippers and that the relationship between them and the carriers is not one subject to control by the Commission. The warehouse companies are 'persons' authorized to lodge a complaint with the Commission by Section 13 (1) of the Interstate Commerce Act, and they are 'persons' within the meaning of that word as used in Sections 2 and 3 of the Act. The relationship between persons and rail carriers with which the Commission is authorized to deal, is not formal, and is not to be determined exclusively by reference to bills of lading. In point of substance the warehousemen were consignors and consignees of merchandise, and they alone could act as such in the case of carload shipments which they assembled or distributed. In this respect they do not differ from freight forwarders who render a like service so far as concerns their relations with the carriers. *Lehigh Valley R. Co. v. United States*, 243 U. S. 444, 61 L. ed. 839, 37 S. Ct. 434; see *Interstate Commerce Commission v. Delaware, L. & W. R. Co.*, 220 U. S. 235, 55 L. ed. 448, 31 S. Ct. 592; *Great Northern R. Co. v. O'Connor*, 232 U. S. 508, 58 L. ed. 703, 34 S. Ct. 380, 8 N. C. C. A. 53. The evil of discrimination was the principal thing aimed at by the Act, see *Louis-*

ville & N. R. Co. v. United States, 282 U. S. *ante*, 672, 51 S. Ct. 297, and its language is certainly broad enough to embrace all discriminations of the sort described which it was within the power of Congress to condemn. *Shreveport Case* (*Houston, E. & W. T. R. Co. v. United States*), 234 U. S. 342, 356, 58 L. ed. 1341, 1350, 34 S. Ct. 833. Section 3 makes it unlawful for any rail carrier 'to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever * * *' U. S. C. title 49, Section 3."

The "persons" on whose behalf this complaint was brought before the Commission do both as a matter of substance and as a matter of form under the bills of lading bear the relationship of consignor and consignees of the commodities involved.

The exporter or importer at the ports, and the locality of which they are a part, bear exactly the same relationship to the export and import traffic which any wholesale distributor or jobber bears to domestic traffic. The Shreveport case (*Houston, East and West Texas Railway Company v. United States*, 234 U. S. 342) is based upon a decision of the Interstate Commerce Commission involving competitive jobbing interests at Shreveport and at Houston and Dallas. The Commission's order, based upon a finding of undue preference and advantage to the Texas cities, required the carriers "to cease and desist from charging higher rates upon any commodity from Shreveport into Texas than are contemporaneously charged for the carriage of such commodity from Dallas [and Houston] toward Shreveport *for an equal distance*." (23 I. C. C. 31.)

That this is the case and that carriers sought to defend their rates on similar theories is apparent from the following quotation from the Commission's decision:

> "This letter supports on the one hand the theory of the Louisiana Commission that the Texas Commission

is acting *in loco parentis* to the *jobbing* interests of Texas, and on the other hand supports the theory of some of the carriers justifying the higher local rates out of Shreveport upon the ground that the through rate from point of origin in the north and east to Texas, when made up of the rate to Shreveport plus the local out of Shreveport, is not unreasonable.

This latter contention has been made before the Commission at various times, and we have uniformly held that a carrier could not impose an unreasonably high local rate upon any community because of the advantages that it properly enjoyed for securing low inbound rates. See *Commercial Club of Omaha v. C. R. I. & P. Ry. Co.*, 6 I. C. C. 675; *Daniels v. C. R. I. & P. Ry. Co.*, 6 I. C. C. 458; *Eau Claire Board of Trade case*, 5 I. C. C. 293; *Savannah Bureau of Freight & Transportation case*, 8 I. C. C. 377.

It is not the function of a railroad to equalize the commercial advantages of cities. If Shreveport is so situated by reason of her position on the Red River and her proximity to the Mississippi that the railroads serving her are justified in extending to her inbound rates which are lower than those extended to Dallas and other cities in Texas, this is her advantage of which she may take full benefit. The carriers may not say that they will absorb in the outbound rates such advantages as Shreveport has upon her inbound rates. *Railroads may assume that they have the right to control the destinies of cities and limit their jobbing territory or expand it as they see fit, but this is not a policy consistent with the theory of governmental regulation. If the inbound rates to Shreveport are compelled by natural conditions the discrimination in her favor is not undue. If however, this is an artificial relation established by the railroads, it is unlawful. If natural, the railroads certainly should not destroy it. If artificial, it never should have been established and should now be removed. The act to regulate commerce is the outgrowth of a popular conviction that the railroads when unhampered by restrictive law attempted successfully to prescribe and define the channels of commerce in such way as to favor certain localities, industries, and individuals.* By the institution of this act Congress substituted for the regulation of trade by

common carriers the regulation of common carriers by the government in accordance with certain prescribed rules to be applied as to ascertained conditions. We do not here pass upon the relation between the rates into Shreveport from the north and east and those extended by the carriers to Texas points. If Texas communities have just reason to complain of this relationship which has been created by the carriers, hearing will be given them upon this matter and the full power of the Commission exercised to correct any wrong which may exist in this situation." (Italics ours) (Pages 34-35.)

Needless to say, the most bitter clashes before the Commission have involved exactly similar interests, since in the distribution of commodities freight rates play an all-important point.

The traffic moving through the ports on joint through rates to and from points beyond is not involved in this case. There is a broad distinction between traffic moving through a port on *through joint* rates and traffic which moves to or from a port on certain rates for trans-shipment beyond on entirely unrelated rates. The proceeding before the Commission involve only those rates published by rail carriers for application to and from the respective ports. It had no relation to through joint rates. For example, the complaint was directed to rail rates to and from the ports for application on coastwise movement in domestic traffic. This was not an important feature of the case for the reason that the great portion of the domestic traffic moving through the ports in question moves on *through* rates which have been made subject to the jurisdiction of the Commission under the provisions of the Panama Canal Act of August 24, 1912, Chapter 390, 37 Stat. at L. 560, 568. This Act amended the Interstate Commerce Act by giving that body the authority to establish through routes and maximum joint rates to cover movement by a common carrier or carriers between points in the United States by rail and water.

The nature and extent of this amendment was discussed by this court in the case of *Chicago, Rock Island & Pacific Railway v. United States*, 274 U. S. 29, where the court sustained an order of the Interstate Commerce Commission establishing maximum reasonable rates for the movement of cotton over routes which had theretofore been employed by rail and water carriers through the Gulf ports under an arrangement for continuous carriage. The complainant in that case was the Houston Cotton Exchange & Board of Trade, a representative of port interests, yet neither the defendants, the commission, nor the courts raised any question of its rights to a through route and a reasonable rate, although the traffic was much more in the nature of through traffic than that involved here.

The character of commerce embraced in that decision was not before the Commission in the instant cause. On the other hand, where goods are shipped to the ports and after arrival at such ports they are trans-shipped via water lines over which the Commission has no jurisdiction, then the rail rates are independent rates which are subject to all of the provisions of the Interstate Commerce Act (where the commerce is interstate in character), and such is the character of commerce involved in this proceeding.

In the case of export and import traffic involved herein the Commission dealt entirely with separately published rates which were voluntarily established by the carriers and filed with the Commission. The same rate would apply irrespective of what character of water rate was charged for the movement beyond the port upon the traffic in question. For example, a shipment of grain to New Orleans for export would be placed in the elevators at New Orleans. Thereafter it would be loaded out upon a separate contract which might be for movement over a regular steamship line or a tramp steamer and the matter of the charges for the service beyond the port would be a matter of contract between the exporter and water line with which he made his bargain. The Interstate Commerce Commission would

have no power directly or indirectly to regulate such rates and the only power resting in any governmental agency which might affect such rates is a limited power of the Shipping Board to name maximum rates. The record shows that there were conference agreements between regular steamship lines serving certain ports but such agreements do not cover all commodities and as the record in this case shows they did not in fact cover grain. In such cases the two contracts of shipments are totally separate and unrelated and as has been pointed out above the ports have a direct relation to, and interest in, the commerce.

c. The legislative history of section 3(1) discloses that Congress had no intention to exclude ports and port interests from the protection accorded "any particular * * * locality" by section 3(1).

As pointed out in the original brief of the New Orleans Joint Traffic Bureau, page 78, Section Three of the Interstate Commerce Act is substantially similar to Section 2 of the English Act except that it added the term "locality" to the list protected against unreasonable prejudice or disadvantage. The addition of that term can hardly be regarded as meaningless. Yet it is impossible to conceive of a shipper, *i. e.*, consignor or consignee, which does not qualify as a "person," a "company," a "firm" or a "corporation." It is hardly likely that by "locality" Congress meant to include only the aggregate of a group of shippers residing in certain territorial limits since under other provisions of the Act they could plainly unite to protect a common interest. It is conceivable and much more logical that Congress intended to protect certain affected interests other than those bearing the relationship of *shippers* to the carriers regulated.

This larger interest was recognized by the Commission from the beginning. In *Export & Domestic Rates*, 8 I. C. C. 214, 265, it said:

> "There are perhaps two kinds of injury which follow from the maladjustment of freight rates. One is, so to speak, an indirect injury to the community as a whole; the other a direct injury to some particular individual or industry. The Act to Regulate Commerce was undoubtedly intended to cover both classes; still, it is the direct injury which appeals more strongly to the sense of right and wrong, and demands more loudly some immediate redress."

That this larger community must have consideration is also apparent from the express statement of this court in *The Import Case*, 162 U. S. 197.

The legislative history of the Act certainly justified this interpretation. A casual examination of the debates incident to the passage of the Act will show that Congress was concerned over the growth of large cities, the concentration of population, manufacturers and wealth in favored localities and desired to protect the right of localities not so favored to rates which would permit them to engage in all the multiform activities of commerce. Congressmen had seen localities in their states shrivel up, property values destroyed, and all excuse for attendant activities which make for growth wiped out by the application of unduly prejudicial rates.

Merely as illustrative of the attitude of mind prevailing in the environment in which the law was enacted we give the following excerpt from Senator Coke's statement:

> "The long haul, which the whole country is taxed to maintain at bare cost of transportation, builds up Eastern centers but destroys cities and towns on the South Atlantic and Gulf seaboards. Galveston, New Orleans, Mobile, Savannah, Charleston and Norfolk are all stationary, or in a condition of decay for the simple reason that the long haul takes away from them the support of the country naturally tributary to them. It is at these points that Southern and many of the Western products should reach tidewater and would reach tidewater but for discrimination in favor of the long haul."[1]

[1] Congressional Record, Thursday, May 6, 1886, page 4238.

But we see as chiefly significant the express addition of the term "locality," and we urge upon the court that unless it is construed as mere surplusage, it must refer to that community entity consisting of shipping, manufacturing, processing, distributing, warehousing, banking, building and construction, and all the other activities which go to make up a community, so as to prohibit the carriers from the maintenance of unjustifiably prejudicial rates which gradually sap the life of a locality, and transfer population, property values, etc., to the favored locality.

The attempt of appellants to exclude a port from the protection of the prohibition of discrimination "any particular" locality on the basis of congressional history must fail miserably. Other than general expressions pointing out the general purpose of the various sections which are too well established to be arguable, able counsel for appellants have been able to find only a colloquy between Senator Hoar of Massachusetts and Senator Cullom which affords them the slightest comfort. A short excerpt from this is given on page 28 of the Texas and Pacific brief and one somewhat longer on pages 32-33 of the New Orleans brief. This colloquy concerned the interpretation of section 4, Senator Hoar being desirous of knowing whether carriers would have to hold the Boston rate as a maximum to intermediate points, if they met the New York rate from Chicago, Omaha, or San Francisco. Senator Cullom's final statement was:

> "*So far as this section is concerned*, when a load of corn, wheat, cattle or what not is started from Chicago, there is nothing in this bill that prohibits the transportation company taking the product in a car from Chicago at exactly the same rate to Boston that it takes it to New York—not a single line."[1]

A moment later Senator Cullom gave a further explanation of his reply as follows:

[1] Congressional Record, Monday, January 10, 1887, page 486.

"Now, how are we ever going to regulate these railroads? The Senator from Massachusetts steps in and says that is going to interfere with the trade of Boston; it is going to stop the export trade and the import trade that is going on at the city of Boston. I do not know whether it will do so or not, but I do not believe it will because those words, as I said a while ago, 'under like conditions and circumstances,' are words that the Commission, that the railroad men, that the courts are bound to construe in the most liberal manner consistent with the actual honest commerce of this country.'"[1]

Quite obviously Senator Hoar did not find this explanation satisfactory as he continued his fight on Section 4. Neither did he find the statement of Representative Crisp who was in charge of the bill in the House after the conference report at all satisfactory.[2]

In the course of the debate Senator Gorman mentioned the existing carriers agreement under which Baltimore and Philadelphia took certain differentials under New York on export rates because of shorter distances as being highly desirable, and indicated that it was the intention of Congress to extend this rule in the interest of the public.[3]

The difficulty of reaching any definite results from the statements in the course of the debate is well demonstrated by the statement of Senator Mitchell, that since no two members of the conference committee could agree on the construction of the Fourth Section of the bill, he supposed it would be necessary to interpret the language used for himself.[4]

In summing up Senator Cullom said after specific reference to Senator Hoar's contention:

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[1] Congressional Record, Monday, January 10, 1887, page 486.

[2] Congressional Record, Friday, January 14, 1887.

[3] Congressional Record, Tuesday, April 27, 1886, page 3872.

[4] Congressional Record, January 12, 1887, pages 573, 577.

"I have not said that upon any given statement of facts as put to me by any member of the Senate the bill meant one thing or the other; but I have said, and I submit that any candid man must agree with me, that in the construction of the proposed statute, in the application to the transportation of freight from one part of the country to another where the words 'under like circumstances and conditions' are used, they must be considered as an element in determining whether a shipment of freight from one point is to be governed by the same rule that governs it as to charges from another point. That is all I have contended for. Judge Crisp expressed the opinion on the state of facts put by the Senator from Massachusetts to him, that the circumstances under the bill, as he construed it would be the same. We might differ upon that point or we might not, but it is no ground for declaring that the conference committee either on the part of the Senate or the House disagree as to the meaning of the provisions of the bill."[1]

In so far as statements on the floor of Congress are admissible to aid in the interpretation of the bill they support the view that Congress intended to protect the interests of "any locality" whether as a port, a distributing center, or a manufacturing center, against every form of unlawful prejudice.

d. Uniform executive construction of an ambiguous statute will be given great weight and re-enactment of the subject-matter of the statute by Congress without changing the language will amount to a Congressional adoption of the executive construction.

The general rule as to the binding character of long-continued, uniform executive construction is stated in *New York, New Haven and Hartford Railroad Co. v. Interstate Commerce Commission*, 200 U. S. 361, 401, as follows:

"Now, without at all intimating that, as an original question, we would concur in the view expressed in the

[1] Congressional Record, Friday, January 14, page 658.

case last cited, that to have applied the act to regulate commerce, under proper rules and regulations for the segregation of the business of producing, selling, and transporting, as presented in the Haddock and Coxe Bros. Cases would have been confiscatory, and without reviewing the rulings made by the Interstate Commerce Commission in those cases, and adhered to by that body during the many years which have followed those decisions, we concede that the interpretation given by the Commission in those cases to the act to regulate commerce is now binding, and, as restricted to the precise conditions which were passed on in the cases referred to, must be applied to all strictly identical cases in the future; at least, until Congress has legislated on the subject. We make this concession because we think we are constrained to so do, in consequence of the familiar rule that a construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, and has been impliedly sanctioned by the re-enactment of the statute without alteration in the particulars construed, when not plainly erroneous, must be treated as read into the statute. Especially do we think this rule applicable to the case in hand, because of the nature and extent of the authority conferred on the Commission from the beginning concerning the prohibitions of the act as to rebates, favoritism, and discrimination of all kinds, and particularly in view of the repeated declarations of the court that an exertion of power by the Commission concerning such matters was entitled to great weight, and was not lightly to be interfered with."

In *United States v. Cerecedo Hermanos y Compania*, 209 U. S. 337, 339, this Court said:

"We have said that when the meaning of a statute is doubtful, great weight should be given to the construction placed upon it by the Department charged with its execution. *Robertson v. Downing*, 127 U. S. 127 U. S. 607; *United States v. Healey*, 160 U. S. 136. And we have decided that the re-enactment by Con-

gress, without change, of a statute, which had previously received long continued executive construction, is an adoption by Congress of such construction. *United States vs. Falk*, 204 U. S. 143, 152.

"Judgment reversed.

"Mr. Justice White and Mr. Justice Peckham concur solely because of the prior administrative construction."

It is to be noted that in the above case Mr. Justice White and Mr. Justice Peckham evidently did not agree with the construction previously placed upon the statute by the Department, but felt constrained, in view of the well established rule, to hold, that in view of the re-enactment of the statute without change, Congress had adopted the Department's previous construction of the statute.

In the case of *United States vs. Johnston*, 124 U. S. 236, cited by Mr. Justice Holmes in the case just quoted from, Mr. Justice Harlan rendered the opinion of the court, and said:

"In view of the foregoing facts the case comes fairly within the rule often announced by this court that the contemporaneous construction of a Statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight and should not be disregarded or overturned except for cogent reasons and unless it be clear that such construction is erroneous."

This rule was applied in the decision of this court in the case of *United States of America v. James E. Farrar*, 281 U. S. 624, which case involved the question as to whether or not the prohibitions and penalties of the National Prohibition Act apply to a purchaser of liquor. Although Section 6 of the Act provided that no one should purchase any liquor without first obtaining a permit and although there are no express words in the Act exonerating a purchaser from liability under the penalties thereof, yet the court by

unanimous opinion held that the indictment charged no offense because of the legislative and executive history of such provisions under which purchasers have not been considered as being guilty of the offense. The language of the Act was clearly ambiguous and this court concluded its opinion with the following significant sentence:

> "If aid were needed to support this view of the matter, it would be found in the fact, conceded by the government's brief, that during the entire life of the National Prohibition Act, a period of ten years, the executive departments charged with the administration and enforcement of the act have uniformly construed it as not including the purchaser in a case like the present; no prosecution until the present one has ever been undertaken upon a different theory; *and Congress, of course well aware of this construction and practice, has significantly left the law in its original form.* (Italics ours)
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> "To the same effect are *Brewster v. Gage*, 280 U. S. 327 (1930); *United States v. Sweet*, 189 U. S. 47; *Herald, et al. Committee of the Person and Estate of Peters v. District of Columbia*, 254 U. S. 20; *N. Y. N. H. & H. R. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361; *United States v. Philbrick*, 120 U. S. 52; *United States v. Alabama Great Southern R. R. Co.*, 142 U. S. 216; *Edwards v. Darby*, 12 Wheat. 206."

e. Prior to the enactment of the Hepburn Act of 1906 the Interstate Commerce Commission had already adopted a settled and uniform construction of section 3 to the effect that ports were entitled to the protection thereof on import and export traffic and its orders had been sustained by court decision.

From the very first the Commission has interpreted Section 3 as giving to one *port* protection against undue preference to another *port* on export and import traffic.

The first case involving a direct controversy between ports under Section 3 was decided in 1898. *New York Produce Exchange v. Baltimore & Ohio R. R. Co.*, 7 I. C. C. 612. The New York Produce Exchange, composed of merchants

residing in New York engaged chiefly in the handling of grain for export, attacked differentials in the export grain rates given to Philadelphia and Baltimore on the ground that they unduly preferred those ports as "localities" to the prejudice of the port of New York. The Commission dismissed the complaint upon the merits, but its careful consideration showed that it entertained no doubt, and that counsel before it entertained no doubt but what each of these port cities was entitled to the protection of Section 3 insofar as the export traffic was concerned.

Indeed, it expressly said:

> "It might happen that some combination of these lines, for the purpose of promoting their interests at some other point, would sacrifice the port of New York, or that for the purpose of promoting their interests as to some other kind of traffic they would sacrifice this particular traffic. If anything of that sort were apparent, if there seemed to be anything arbitrary, anything unreasonable, *any undue preference against this locality* or this species of traffic, it would be our duty to correct it. But there is nothing of that kind and we can do no better than to leave this matter where competition has left it." (P. 683) (Italics ours.)

It did point out that the differentials granted Baltimore and Philadelphia could be supported by the shorter distances; that they were justified in part by the fact that berth rates on grain were slightly higher than from New York; that there was a serious question as to whether the differentials had diverted any grain traffic from New York. In conclusion it stated:

> "In arriving at these conclusions the year 1896 has been treated the same as previous years covered by the investigation. If the diversion of export grain from the port of New York, which is shown to have taken place in that year, should continue in subsequent years, and it should appear with reasonable certainty that the published rates had been maintained to all the

ports, the actual effect of these differentials upon the movement of grain could be determined with confidence and a different question would be presented, which might merit further consideration, and of which the disposition of the present case would not be controlling." (Page 685)

An outstanding case in dealing with port relationship is that of *Savannah Bureau of Freight & Transportation v. Louisville & Nashville*, 8 I. C. C. 377, decided January 8, 1900. It is particularly important because the order of the Commission was approved by the Federal Circuit Court in *Interstate Commerce Commission v. Louisville & Nashville Railroad Co.*, 118 Fed. 613, decided in 1902, and an injunction issued restraining the carrier from charging rates other than those ordered.

In that case, as in this, the Commission and the court recognized:

1. That a carrier could grant *some* preference to a port on its own line compared to one it served on joint rates;

2. That such preference must not become *undue;*

3. That the Commission had the power and the duty to determine when the preference became *undue.*

The Savannah Bureau of Freight & Transportation, an association of business men of that city, complained to the Commission that certain rates charged by the Louisville & Nashville from stations on its Pensacola & Atlantic divisions in Florida on cotton, turpentine and rosin were unduly prejudicial to Savannah and unduly preferential of Pensacola, Mobile and New Orleans. The rates involved applied for export on both cotton and naval stores.

The rate on cotton, both for export and domestic purposes, to Savannah was $3.30 per bale, while to Pensacola the rate was $1.50 per bale. To Mobile the rate was $2.00 per bale and to New Orleans $2.50. These rates applied from stations on the Pensacola & Atlantic Division for distances of 114 to 259 miles to Mobile and of 255 to 400 miles

to New Orleans. The distances to Savannah were 265 to 410 miles. From a central point on the line the distances were 183 miles to Mobile, 324 miles to New Orleans and 341 miles to Savannah. Considering these facts the Commission found:

> "The carriers to Savannah, also, by advancing the cotton rate to that city gave undue and unreasonable preference and advantage to Mobile, and New Orleans and to dealers in cotton at and traffic in cotton to those places; and they subjected Savannah and her cotton merchants and shipments of cotton to that market to wrongful prejudice and disadvantage. The whole advance was unlawful. It violated sections 1 and 3 of the Act; and any higher rate on uncompressed cotton from any of these Pensacola stations to Savannah than the former difference of 25 cents per bale above the rate in force from the same stations to New Orleans is unlawful under those sections."

About 80 per cent of the naval stores received at Savannah was exported while 20 per cent of that received at Pensacola was exported. Lower export freight rates were available from Savannah and marine insurance was higher at Pensacola. (Pages 381-2)

The Commission recognized the right of the Louisville and Nashville to accord some preference to Pensacola provided that the preference accorded was not undue, but it drew the line at a point where it determined the preference accorded Pensacola became undue.

The Louisville & Nashville did not own or control any road entering Savannah. Freight bound for Savannah was delivered to connections at River Junction. It did participate in the joint rates via this junction. The following quotation from the Commission's decision is significant:

> "The Louisville & Nashville insists also that it is unusual for a carrier reaching a seaport on its own line to make joint rates with another carrier which will

divert traffic originating on its road to a rival seaport. In the view we take of this contention, it is unnecessary to discuss whether this is or is not a railway practice. It is not understood that the complainants are here asking for an order which will so divert traffic from Pensacola as to place it at a disadvantage as compared with Savannah. If a railroad company cannot secure other than an unreasonably low share of the joint rate to a seaport on another road, it may be justified in declining to join in such a rate, especially when it can take the traffic to a seaport reached by its own road; but a carrier engaged in transportation over the through line finds no such justification when it is able to secure for itself a share of the joint rate which fully equals the rate established by it for purely local service over like distances on its own road. That is this case under the readjustment indicated by the findings."

When the Louisville & Nashville refused to comply with its order, the Commission appealed to the courts for enforcement and this was granted in a carefully considered decision by Judge Emory Speer of the Southern District of Georgia at 118 Fed. 613.

The decision sets forth the facts supporting the finding of the Commission as to the prejudicial nature of the rates on cotton as follows:

"The rates on uncompressed cotton, also the subject of animadversion and order by the commission, are not less prejudicial to the shipper than to the *port* of Savannah. Pensacola is not in any sense a cotton market. Savannah ranks among the first cotton *ports* in the world. These are Galveston, New Orleans, and Savannah. The rates imposed by the Louisville & Nashville on shipments from stations on the Pensacola & Atlantic Division to New Orleans and Savannah are blanket rates, or group rates, to both markets. At the date of the complaint the rate from Pensacola & Atlantic stations to New Orleans was $2.50 a bale, and to Savannah $2.75 a bale. In September, 1897, while the

complaint was pending, the Savannah rate was raised from $2.75 a bale to $3.30 a bale, and no advance was made on the New Orleans rate. Consequently, the Savannah rate is 80 cents a bale higher than the New Orleans rate. At the time of the advance the rate of $2.75 per bale to Savannah had been in force for nine years, and appears to have been, as found by the commission, a reasonable, fair, and remunerative rate. There was no change of conditions. The sole reason assigned by the traffic manager of the Louisville & Nashville for the increase of rate was that the lines from River Junction to Savannah desired to secure more revenue for the transportation of cotton. Out of a rate of $2.75 the lines east of River Junction received $1, and the Louisville & Nashville received for the haul to River Junction $1.75 a bale. It does not appear, therefore, that the desire for the increase of revenue was confined to the connections of the Louisville & Nashville. This is plain from the fact that, while the average haul of the Louisville & Nashville to River Junction is 80½ miles, that company demanded and received $1.75 therefor, while the connecting roads to Savannah received only $1 for a haul of 259 miles. It may be true that the increase in rate was not made at the instance of the Louisville & Nashville, but it is evident enough that the excessive proportionate charge of that company is responsible for the increase, and consequently for the excessive through rate of $3.30 per bale. The commission condemns this entire through rate for its excessive character. *That it is relatively prejudicial to Savannah, and preferential in favor of New Orleans, is also true.* The average distance from stations on the Pensacola & Atlantic Division to Savannah is 339½ miles, while the average distance from the same stations to New Orleans is 326 miles. This makes the average distance to Savannah only 13½ miles greater, and yet the Savannah rate exceeds the New Orleans rate by 80 cents a bale." (Pp. 620-621)

The decision deals with contentions substantially similar to those urged here as follows:

"Where the movement in a certain direction is greatly in excess of the movement in another, or where there is a substantial difference in the cost of operation by reason of heavy grades, or because the tonnage runs largely in one direction, it is conceivable that a discrimination in rates may not be unreasonable; but do any of these conditions appear in this case? On the contrary, by the evidence of a principal witness for the respondents the contrary is made to appear. Mr. Saltmarsh, division superintendent of the Pensacola & Atlantic Railway was asked: 'Is there any reason why the haul east over the Pensacola & Atlantic Division should be more expensive than the haul over the division for the same distance west?' He replied: 'So far as the actual cost of transportation is concerned, perhaps not; but the bulk of our business is southbound and we have empty cars coming north. To the extent that this is the case, it would, of course, make a difference in the cost of transportation in each direction.' Surely it cannot with good reason be urged that this would justify the tremendous difference in rates of which complaint is here made. Nor is there any other evidence to justify rates so preferential to one port and so prejudicial to the other.

It is, moreover, contended that it is competent for the Louisville & Nashville Railroad Company to advance its own interest to the extent of building up a seaport on its own line at the expense of another port on a rival line. That this may be done to a reasonable degree may be conceded. It is competent for a railroad company to so adjust its rates as to promote its legitimate interest, but it cannot with this purpose, adopt rates excessive in themselves, unduly preferential to its own port and unduly prejudicial to another port." (Page 623)

"It may be said generally that in this case the usual plea of competition is neither set up nor available to sustain these rates. The discriminations against Savannah are practically admitted by the respondents. The sole justification relied upon is the promotion of the interest of the Louisville & Nashville Railroad by building up a nearby port, and further by securing the long haul from Pensacola towards the northwest. But considerations of this character cannot justify rates

unreasonable and excessive in violation of section 1 of the law. *Nor can they justify rates unduly prejudicial to one locality and unduly preferential to another, in violation of section 3 of the law.* Nor has a railway company engaged in interstate and foreign commerce the right or authority to enact rates which are actually prohibitory to traffic in one direction without regard to the wishes of the shippers, or the fair opportunity of a community thus prejudiced to promote its commercial prosperity. In all cases it must be regarded as true that discriminations made for the purpose of promoting the interests of the carrier are subservient to the interests of the general public and to the principles of justice in such matters sought to be attained by the purpose of Congress to regulate commerce." (Page 625) (Italics ours)

f. The adoption of the Hepburn Act in 1906 and the Elkins Act in 1910 amounted to the legislative confirmation of the uniform construction of the statute by the Commission.

Section 15(1) was largely rewritten in the Hepburn Act of June 29, 1906, the most important change being that the Commission was given power to fix maximum rates for the future, but it is also noteworthy that whereas Section 15 of the original act provided that where "anything has been done or omitted to be done in violation of the provisions of this Act" the Commission should issue a cease and desist order, the provision as amended by the Hepburn Act read that where any of the rates "are unjust or unreasonable, or unjustly discriminatory, or *unduly preferential or prejudicial*, or otherwise in violation of the provisions of this Act" the Commission should prescribe maximum rates, etc.

The addition of these references to the rates condemned by Sections 1, 2, and 3 may not have extended the circumstances under which the Commission could enter an order. By taking these words directly from Section 3 without limitation, Congress must be regarded, however, as having approved the interpretation of the Commission and the

courts, and the orders issued by the Commission requiring observance of the interpretation made. See *New York Produce Exchange v. Baltimore & Ohio R. R. Co.*, 7 I. C. C. 612; *Interstate Commerce Commission v. Louisville & Nashville Railroad Co.*, 118 Fed. 613.

Preceding the action of Congress on the Hepburn Bill, its attention was specifically called to the decision of the Commission in the *New York Produce case* by a witness before the House Committee representing the New York Board of Transportation and by the President of the Delaware & Hudson. House Report 4093, 1905, pages 141, 238. This Committee also had before it a thorough discussion of various cases in which courts had enforced commission orders, among these being the *Louisville & Nashville case*, just cited. House Report 4093, 1905.

Section 3 was left in its original form. This refusal to amend Section 3 in the Hepburn Act was explained by the Committee as follows:

> "As but little complaint has been made to the Committee concerning classification, it was not deemed wise at this time to suggest new legislation upon that subject. So, too, with the question of relation of rates. The Committee has not deemed it wise at this time to suggest new legislation to change existing law upon that subject. It is one of very great importance—interesting, however, as a rule to certain particular communities rather than the public at large. It involves conflicts between towns and cities rather than the public generally, and it relates more to the building up of certain local interests of a local nature rather than to the interests of the people of the whole country."
>
> Report of Committee on Interstate & Foreign Commerce, January 27, 1906. Report No. 591, 59th Congress, 1st session, page 3.

This same language was retained in the Mann-Elkins Act of June 18, 1910, and Section 3 was left again unchanged.

Under authority of these sections the Commission entered its orders in the following cases among others:

Chamber of Commerce of New York v. New York Central Railroad, (1912) 24 I. C. C. 55.

Mobile Chamber of Commerce v. Mobile & Ohio Railroad, (1914) 32 I. C. C. 272.

City of Astoria v. S. P. & S. Ry. Co., (1916) 38 I. C. C. 16.

The Transportation Act of 1920, February 28, 1920, made numerous changes in Section 15(1), rewriting the section in Section 418. The language with which we are concerned, however, was left without limitation.

Through each of these rather extensive revisions of the Interstate Commerce Act, Section 3(1) remained unchanged. There could hardly be more persuasive evidence that the interpretations of the Commission were not only in accord with the original intent of Congress, but approved and adopted by subsequent Congresses.

g. Following the Hepburn Act and at all times since then the Commission has continued to construe ports as localities entitled to the protection of section 3 as to export, import and coastwise traffic (not moving on joint through rates) and in the enactment of the Transportation Act, 1920, there was a further Congressional adoption of this construction.

The Commission continued to apply the same construction of Section 3(1) after the Hepburn Act as it had adopted before its passage in its decisions and orders entered in accordance therewith.

In the *Chamber of Commerce of New York v. New York Central, etc., Railroad*, 24 I. C. C. 55, complainants, associations of merchants located in the City of New York, alleged that the maintenance of higher export rates to and from New York than to and from the competitive ports of Boston, Philadelphia and Baltimore violated Section 3(1).

The Commission fixed the maximum differentials under New York which the carriers would be permitted to maintain to Baltimore and Philadelphia, and decided that the Boston rates should not be lower than those to New York. The same rules were promulgated on import traffic in a contemporaneous decision, *In the Matter of Import Rates*, 24 I. C. C. 78. In these cases the Commission definitely exercised its powers for the protection of the port of New York against discrimination in favor of Boston or Baltimore and Philadelphia.

In *Mobile Chamber of Commerce v. Mobile & Ohio Railroad*, 32 I. C. C. 272, (1914) the Mobile Chamber of Commerce complained of discrimination in export rates on cotton to Savannah as compared to Mobile. The New Orleans Cotton Exchange intervened asking for the same relief. The Commission stated that

> "The mileages to Savannah are greater in many instances than to Mobile, but there are only a few instances where the rate to Mobile is less than that to Savannah and in instances, where the distance against Savannah is large, the rates are on a parity." (Page 277)

On the basis of this situation it found that:

> "It is the conclusion of the Commission from a consideration of all the circumstances presented that the adjustment of these export cotton rates from points of origin to Mobile are unjustly discriminatory to the prejudice of that *port* as compared to the *port* of Savannah, and the defendants who participate in these rates will be required to readjust them, eliminating the discrimination here found." (Page 277)

In a second report in the same case in 1920, (57 I. C. C. 554) the Commission examined in detail the respective rates maintained to the ports of Savannah and Mobile on export cotton and required an extensive revision in accor-

dance with differentials prescribed to secure to the port of Mobile the advantages of its shorter haul. In passing it is interesting to note:

1. That the Commission condemned as prejudicial parity of rates to the ports where the distances favored Mobile;
2. That it prescribed a differential scheme to remove the undue prejudice found;
3. That it accorded great weight to distance where other factors were equal.

In the *City of Astoria v. S. P. & S. Ry. Co.*, 38 I. C. C. 16, (1916) the Commission required the revision of export rates to the port of Astoria, Oregon, saying:

> "On that question it will suffice to say that in recognizing the effect of Portland's competition on Tacoma and Seattle the carriers may not lawfully overlook the effect of the competition of Seattle and Tacoma upon Astoria as a *port* and harbor."

This same rate situation came before the Commission again in 1920 but this time included also the question of whether the parity of rates resulted in preference to the Puget Sound Ports and prejudice to Portland. In *Inland Empire Shippers League v. Director General*, 59 I. C. C. 321, the Commission found that the parity of rates from a certain territory, where Portland had the advantage in distance and cost resulted in undue prejudice to Portland and prescribed a ten per cent differential in its favor. The defendant carriers and the Puget Sound ports urged practically the same contentions as those presented by the appellants here, as the following quotation shows:

> "Defendants and Puget Sound interveners, in addition to challenging the distance and cost-of-service statistics of complainants, express the view that the rate

adjustment in question is the natural resultant of competitive railroad and market conditions; that it does not transgress the limits of reasonableness; that it has been highly beneficial to the producers of the Columbia River basin; and that it has not been injurious to Portland. The more rapid development of Seattle as a port, they say, is in no way due to the equalization of rates in the Columbia River basin, for Portland has kept pace in the handling of grain, which is the principal product of the basin; the facilities of all the ports are needed for this traffic, Portland has received all the grain that its facilities could care for, and a readjustment of rates which would divert more of the crop to that port would result only in congestion, without benefit to anyone. *They point out that much of the grain is moved to the coast for export, and that the ocean rates from the various ports are the same, regardless of differences in distance.* They lay stress upon the fact that the parity of rates in the Columbia River basin has existed for years, that the rates have frequently been reviewed by the state commissions or by us, and that no one questioned the adjustment until these complaints were brought." (P. 340)

In that same case the Commission propounded the general rule which it has consistently followed, that:

"Our decisions which hold in substance that a locality or community may not lawfully be deprived in the adjustment of rates of its natural advantages, and our decisions which in substance approve the practice of blanketing rates are not in conflict. We have never held that it is necessary, in order to preserve advantages of location, that rates should be based rigidly on mileage or an cost of service. If this were necessary, many of the freight rates of the country would be unlawful. Such a system of rates would, indeed, as a practical matter be impossible of application, and we do not understand that complainants are contending for such a system here. There are limits of reasonableness in the making of rates which admit of a certain degree of flexibility in their adjustment, for the sake of convenience and simplicity or for the purpose

> of meeting commercial and competitive conditions. Out of such situations rate blankets grow, and there is nothing unlawful in their construction, *provided they are well balanced and their advantages and disadvantages fairly distributed.*" (P. 341)

In *Coffee from Galveston and Other Gulf Ports*, 58 I. C. C. 716 (1920) upon complaint of the New Orleans Joint Traffic Bureau and others the Commission found that a proposed scheme of rates on coffee was unduly prejudicial to New Orleans and other gulf ports and preferential to New York. The comparative rates between New Orleans and Galveston were also involved and in a rehearing of that case, 64 I. C. C. 26 (1921), the Commission found:

> "That where the distances from New Orleans and Galveston do not differ by more than 100 miles the rates should be the same and where the difference is in excess of that distance differentials favoring the port which has the advantage in distance may be established, properly graded and not exceeding 7 cents." (P. 32)

Reference is also made to *Maritime Association of Boston Chamber of Commerce v. Ann Arbor Railroad Company, et al.*, 95 I. C. C. 539, (1923) 126 I. C. C. 199 (1927), where the Commission dealt once again with the controversy between the eastern ports, in the matter of export rates under Section 3(1).

In addition to the above cases the Commission has recognized the status of a port as a locality in the following cases:

> Aransas Pass Channel & Dock Co. v. G. H. & S. A. Ry. Co., 27 I. C. C. 403.
> Cottonseed Products to Port Arthur, Tex., 38 I. C. C. 378.
> S. P. Co. Ownership of Atlantic Steamship Lines, 43 I. C. C. 168.

New Orleans Cotton Exchange v. L. & N. R. R. Co., 46 I. C. C. 712.
Export Freight Free Time, 47 I. C. C. 162.
Cotton and Cotton Linters to Pacific Coast Ports, I. & S. Docket 1393, 69 I. C. C. 735.
Galveston Commercial Asso. v. A. & V. Ry. Co., 77 I. C. C. 388.
Sugar Cases of 1922, 81 I. C. C. 448.
Charleston Traffic Bureau v. A. G. S. R. R. Co., 89 I. C. C. 501.
Canned Goods and Iron and Steel Articles from Gulf Ports, I. & S. 2157, 91 I. C. C. 623.
Orange Chamber of Commerce v. A. & W. Ry. Co., 98 I. C. C. 101.
Mobile Chamber of Commerce v. M. S. B. & P. Ry. Co., 129 I. C. C. 419.
Newsprint Paper from Lake Charles, 132 I. C. C. 543.
Charleston Traffic Bureau v. A. & R. R. R. Co., 139 I. C. C. 730.
Lerio Patent Cup Co. v. A. F. & F. R. R. Co., 139 I. C. C. 494.
Bananas from Gulf Ports, I. & S. 2761, 123 I. C. C. 181, 140 I. C. C. 682.
Lake Charles Harbor & Term. Dist. v. Brimstone R. & C. Co., 157 I. C. C. 720.
Norfolk Port Commission v. C. & O. Ry. Co., 159 I. C. C. 169.
Norfolk-Portsmouth Freight Traffic Commission v. A. & R. R. Co., 159 I. C. C. 177.
Baltimore Chamber of Commerce v. A. A. R. R. Co., 159 I. C. C. 691.
Oyster Shells to Southern Territory, I. & S. 3205, 161 I. C. C. 623.
Imported Fertilizer Materials, I. & S. 3345, 161 I. C. C. 649.
Rate Structure Investigation, Part 3, Cotton, 165 I. C. C. 595, 635.
Port Arthur Chamber of Commerce & Shipping v. A. & R. R. Co., 169 I. C. C. 753.
Leaf Tobacco from North Carolina, I. & S. 3559, 174 I. C. C. 422.

Mobile Chamber of Commerce v. G. M. & N. R. Co., 177 I. C. C. 202.
Allowances for Drayage and Barge Service, I. & S. 3540, 177 I. C. C. 209, 215.

The Transportation Act of 1920 revised practically every Section of the Interstate Commerce Act, and rewrote most of its provisions. Section 405 provided:

> "The first paragraph of Section 3 of the Interstate Commerce Act, is hereby amended by inserting '(1)' after the section number at the beginning thereof."

Section 405 then proceeded to revise substantially the remaining portion of Section 3 with which we are not concerned, but made no other change in Section 3(1) itself. Evidently had it disapproved of interpretations made by the Commission and the courts, Congress would have made the necessary changes.

h. The history of legislation establishing the Texas ports as well as general legislation such as Section 500 of the Transportation Act, 1920, and Section 8 of the Merchant Marine Act, 1920, further demonstrates the Congressional intention to prevent undue preference and unjust discrimination of ports with respect to commerce moving to and through such ports.

At the hearings on this case witnesses testified as to the various events which led up to the establishment of the first Texas ports. Prior to 1890 there was no port which could accommodate sea going vessels in the entire Gulf Coast from New Orleans to the Mexican border. Various shipper interests located in the Southwest became interested in the establishment of an outlet for the surplus of commerce moving to foreign countries from United States ports and as a result of this conferences were convened of persons interested in the subject, the first being held at Topeka, Kansas, in 1889. (Record 1732-4; 1739; 2156) Later another conference was held at Denver, Colorado,

and the record shows the broad representation of states attending these conferences. Following the conferences a memorial was presented to Congress requesting that body to give consideration to making appropriations and establishing a deep water port on the Texan Gulf Coast. As a result of this, the Act was passed in 1890 creating the Port of Galveston and authorizing the development thereof. Later by succeeding acts of Congress ports were established and appropriations made therefor at Port Arthur, Texas, Orange, Texas, Texas City, Texas, Beaumont, Texas, and Houston, Texas.

In the proceeding before the Commission consideration was given to the general policy of Congress to protect and preserve in full vigor water and rail transportation in the administration of the Act. In its first decision, 100 I. C. C. 110, 122, it referred to this matter in the following language:

> "In section 500 of the transportation act, 1920, it is declared to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation. Of the same tenor are the provisions of section 8 of the merchant marine act, 1920. The facilities for water transportation from or to and at Galveston can not be preserved in full vigor under a rate adjustment which unduly favors New Orleans. It is important that all ports be kept open and in as vigorous a condition as possible so that water lines may be attracted thereto and the public given the cheapest and most efficient service, both by water and by rail." (Record, 3360-61)

As previously stated Congress after the termination of the World War entered upon a general study and consideration of the several acts to regulate commerce. The Interstate Commerce Act was thoroughly revised and reenacted and as a part of the same act there was added a sec-

tion 500 declaring the policy in favor of the preservation of water and rail transportation and providing for investigations and recommendations to be made from time to time by the Secretary of War. That part of Section 500 which declared the policy reads as follows:

> "It is hereby declared to be the policy of Congress to promote, encourage and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation."

The foregoing statute was enacted February 29, 1920, and shortly thereafter on June 5, 1920, at the same session of Congress the Merchant Marine Act, 1920, was enacted which substantially revised the prior law on the subject. Among other things in that Act was Section 8 which was in furtherance of the declaration of policy set forth in the Transportation Act. It recognized the jurisdiction of the Interstate Commerce Commission in connection with the charges which might be subject to the jurisdiction of the Shipping Board. We quote Section 8 as follows (Section 8, Merchant Marine Act, 1920, 41 Stat. L. 988):

> "Sec. 8 (U. S. Code, title 46, sec. 867) That it shall be the duty of the board (United States Shipping Board), in cooperation with the Secretary of War, with the object of promoting, encouraging, and developing ports and transportation facilities in connection with water commerce over which it has jurisdiction, to investigate territorial regions and zones tributary to such ports, taking into consideration the economies of transportation by rail, water and highway and the natural direction of the flow of commerce; to investigate the causes of the congestion of commerce at ports and the remedies applicable thereto; to investigate the subject of water terminals, including the necessary docks, warehouses, apparatus, equipment, and appliances in connection therewith, with a view to devising and suggesting the types most appropriate for differ-

ent locations and for the most expeditious and economical transfer or interchange of passengers or property between carriers by water and carriers by rail; to advise with communities regarding the appropriate location and plan of construction of wharves, piers, and water terminals; to investigate the practicability and advantages of harbor, river, and port improvements in connection with foreign and coastwise trade; and to investigate any other matter that may tend to promote and encourage the use by vessels of ports adequate to care for the freight which would naturally pass through such ports: Provided, That if after such investigation the board shall be of the opinion that rates, charges, rules, or regulations of common carriers by rail *subject to the jurisdiction of the Interstate Commerce Commission are detrimental to the declared object of this section, or that new rates, charges, rules, or regulations, new or additional port terminal facilities, or affirmative action on the part of such common carriers by rail is necessary to promote the objects of this section, the board may submit its findings to the Interstate Commerce Commission for such action as such Commission may consider proper under existing law.* (Italics ours.)

The function of the Commission in fixing rates or in prescribing rate adjustments being a legislative function and the policy of the law being thus declared, the Commission is clearly under the duty of carrying out its delegated authority and exercising its jurisdiction to prevent action by carriers in depriving any of the ports of the benefit of their geographic location in contravention of the provisions of the Interstate Commerce Act and the declaration of policy as adopted by Congress.

Its duty under this provision is recognized by the decision of the court in *Chicago, R. I. & P. R. Co. v. United States*, 274 U. S. 29, 36, in the following language:

> "And the same act declares it to be 'the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with

the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation.' Sec. 500, 41 Stat. at L. 499, Chap. 91, U. S. C. title 49, Sec. 142.

These and other provisions emphasize the intention of Congress to broaden the control of the Interstate Commerce Commission over rail-and-water transportation and, generally, to extend the regulatory power of that body over all such transportation in the public interest. It would be quite inconsistent with that broad purpose to adopt the narrow construction of the statutory provisions under review which is advanced by appellants. On the whole, and especially in the light of the definite congressional policy which the legislation reflects (Richardson v. Harmon, 222 U. S. 96, 104, 56 L. ed. 110, 113, 32 Sup. Ct. Rep. 27; Holden v. Stratton, 198 U. S. 202, 213, 214, 49 L. ed. 1018, 1022, 1023, 25 Sup. Ct. Rep. 656; Minnesota v. Hitchcock, 185 U. S. 373, 395, 46 L. ed. 954, 965, 22 Sup. Ct. Rep. 650), we find no difficulty in rejecting the construction thus advanced and adopting that which we have indicated, without, at the same time, doing violence to the fair meaning of the language actually employed."

II.

The Appellant Carriers Participate in the Through Rates To and From All of the Ports Involved, and, to the Extent that Such Rates Were Unduly Preferential to New Orleans or Unjustly Prejudicial to the Texas Ports, Such Participation Affords a Proper and Sufficient Legal Basis for the Order Directing Appellants to Remove the Undue Prejudice and Preference.

The orders complained of require the defendants "according as they participate in the transportation" to cease and desist from thereafter publishing, demanding or collecting rates to and from the ports on the traffic involved, which the Commission finds to be unlawful (R. 73, 90, 91, 94). It will be noted that the Commission did not require the carriers to publish export and import rates to and from

the ports. Neither did it require them to publish rates to and from the port for further movement coastwise to points within the United States. As previously stated the coastwise rates are of little or no importance in the proceeding as there is a general line of joint through rates applicable on coastwise traffic. As will be later shown, the Commission only condemned the rates applicable between the ports and a certain restricted territory within the Southwest, in a part of which it prohibited the carriers from charging lower rates to New Orleans than to Galveston where the distance favored Galveston but where the difference was less than 25 per cent. To this part of the order apparently appellants make no objection. When the difference in distance in favor of Galveston was in excess of 25 per cent the Commission prescribed certain differentials but it did not prescribe the manner in which such differentials should be applied. In other words, it left the carriers free to remove the discrimination by increasing the rates to New Orleans, or by reducing the rates to the Texas ports, or by increasing the one and reducing the other to the extent necessary to secure the differential.

It is conceded that the appellants participated in the rates to the prejudiced ports as well as those to the preferred port. The contention of appellants that merely because they cannot control the rates to the Texas ports, they are beyond the pale of the law with respect to Section 3(1) of the Act has been thoroughly discussed in the brief for appellees (pages 97 to 106) and in brief for the carriers intervening in support of the order (pages 56 to 63), and these intervenors will not undertake to repeat such discussion. However, it is pertinent to point out that the Commission has issued no orders fixing export and import rates to and from the ports in question. The appellants can remove the discrimination without joint action with the lines serving the Texas ports by increasing the rates they charge for the longer hauls to New Orleans. As a

matter of fact, the record shows that in complying with the order of June 29, 1927, the differentials were made by reducing rates to the Texas ports in numerous instances while in other instances the rates were advanced to New Orleans (R. 2338, 2356, 2371). Of course, to accomplish either increases or reductions where joint line service is involved it requires the joint action of the participating carriers.

But the appellants were under no compulsion to participate in the rates to the Texas ports. It is true that Section 1(4) of the Act makes it the duty of the common carriers to establish through routes and just and reasonable rates. While the Commission has prescribed through rates to and from New Orleans and the Texas port cities, on local interstate traffic, this does not have the effect of requiring the carrier to haul export traffic to the port. Certainly until the Commission has ordered the appellants to establish joint through rates on export and import traffic, embracing the commodities involved herein, it cannot be said that the appellants do not have it within their own power to remove themselves from the prohibition of the order by the simple expedient of ceasing to participate in the business to and from the Texas ports.

The appellants argue vehemently that the true destination or origin of the traffic involved in export and import commerce is the foreign port. The record shows that there are water lines from New Orleans serving all the ports that are served by lines operating out of the Texas ports. The appellants can therefore accord their shippers and receivers these rates through the port of New Orleans to all foreign ports which may be reached through the Texas ports. They say that they have no interest in the Texas ports because their lines do not serve those ports. They also point out in their supplemental brief (page 66) the finding of the Commission, which they do not question, to the effect that practically every point of importance in the

differential territory is a junction point with lines that serve the Texas ports and it is admitted that the export and import traffic from such points is practically the entire traffic which would be involved from the points on their lines. There is no reason why they cannot give the shippers at these junction points the benefit of rates to New Orleans as low as their competitors accord such shippers for transportation of like commodities to the Texas ports, provided they will not also undertake to participate in the movement of such traffic to the Texas ports. They can say to the shipper that they offer him service for the same total rail cost to a much superior port where he will have more sailings and more opportunities to obtain desirable rates for the movement beyond and thus compete with the Texas port lines without undertaking to engage in such commerce jointly with the latter lines to and from the Texas ports. This they choose not to do.

It is not an answer to say that the appellants would be required to apply the local rates to the Texas ports and therefore would have to charge rates differentially higher to the port of New Orleans on export traffic. The prescribed rates are for domestic traffic. There is no order compelling appellants to transport the traffic to the Texas ports at all if it is in fact export traffic. They may simply say "we will not handle export traffic to the Texas ports because we have no interest in these ports but we will handle the traffic to the port of New Orleans which offers superior advantages and will charge no more than our competitors charge for handling the traffic to the Texas ports."

Obviously the connection of the appellants with the rates to the Texas ports is not a mere participation and they appear to have a sufficient interest in maintaining rates to such ports to make them amenable to the prohibitions of Section 3(1) of the Act.

In brief filed by counsel for the State of Louisiana, intervenor in support of appellants, the contention is made that the Commission has made no enforceable order because it did not specify exactly in what way the discrimination should be removed. Counsel cites the provisions of Section 15(1) which state that the Commission is "authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare or charge, or rates, fares or charges to be thereafter observed in such case." Quite obviously the purpose of the statute was not to require the Commission to prescribe the rate nor to prohibit the Commission from issuing an alternative order. The Commission had before it voluminous testimony showing the amount of the rates on export, import and domestic traffic moving to and from these points but the issue of the reasonableness of the rates in their entirety was not before the Commission. The reopened case did question the reasonableness of the differentials and the Commission considered this but this was in connection with its effort to determine the extent to which it would be necessary to go to remove the undue preference and to prevent the unjust discrimination.

III.

Control by the Missouri Pacific of Seventy Per Cent of the Voting Stock of the Texas & Pacific and All the Stock of the International Great Northern is Sufficient Legal Basis for the Order of the Commission Requiring this Entire Group of Affiliated Carriers to Cease Unduly Preferring New Orleans to the Prejudice of the Texas Ports.

The Texas & Pacific is contending that as a matter of law the Commission has no power to require it to refrain from discrimination against the Texas ports since its line does not reach them. The Commission decided that its

participation in rates and traffic to the Texas ports was all that was necessary to support the order, but there is another factor which this court should consider before it would be justified in overturning the commission's decision as beyond its power. It was admitted of record that the Missouri Pacific owned the entire issue of the 237,030 shares of preferred stock of the Texas & Pacific and 197,385 shares of the 387,551 outstanding shares of common stock, this constituting 69.2 per cent of the voting stock. (Record 3177) This ownership was in pursuance of an order of the Commission permitting the Missouri Pacific to acquire *control* of the Texas & Pacific under Paragraph 5(2) of the Act. *Texas & Pacific Readjustment*, 86 I. C. C. 808.

In its last report (1929) the Commission found that:

> "The findings herein made in the title case make it unnecessary to discuss the question whether the Missouri Pacific, by its ownership of a majority of the outstanding shares of stock of the Texas & Pacific could be held to be responsible for the traffic policy of the latter carrier, and, by virtue of its ownership also of the entire issue of the outstanding shares of stock of the International-Great Northern, could be found guilty of undue prejudice." (R. 3455)

Considerable evidence as to the control of Texas & Pacific by the Missouri Pacific was introduced into the record on the second rehearing. (Record, 3026, 3096-3104, 3113-3114, 3115, 3121, 3177-3181)

In its previous report (1927) the Commission had concluded that the Missouri Pacific did not in a legal sense control the Texas & Pacific. The decision of this court in *Pullman Palace Car Co. v. Missouri Pacific Railway*, 115 U. S. 587, was cited as authority. The decision in *Chicago, M. & St. P. Ry. v. Minn. Civic Association*, 247 U. S. 490, was referred to as authority for the position that if a subsidiary company were used simply as an agency or subsidiary corporate identity would exist. It is the position of

these appellees that the *Pullman Palace Car Company* decision is not controlling and that the affiliation existing is sufficient basis *as a matter of law* to sustain the order of the Commission.

The decision in the *Pullman Palace Car* case involved a private suit between private parties as to the proper interpretation of the meaning of a private contract in which no public interest was involved. Here as Congress recognized in passing the Interstate Commerce Act, there are vital public interests involved, and the fact that the Missouri Pacific does not *choose* to exercise the control which it has in ordinary matters (if that be the case) does not afford it nor the Texas & Pacific immunity from the prohibition of Section 3.

It might be also pointed out that the decision in the *Pullman* case is based primarily on the ground that the reorganized Missouri Pacific Company was bound only to run the cars of the Pullman Company on the lines controlled by the old company and that it was not important to the decision whether the Missouri Pacific had control of the Iron Mountain or not. (115 U. S. 595-6)

Other decisions in which this court has given recognition to the fact that ownership of stock does not create an identity of corporate interest are limited to interpretations of the specific language of the commodities clause which prohibited a carrier from carrying a "commodity" in which it had an interest, *United States v. Delaware & Hudson R. R. Co.*, 213 U. S. 366; *United States v. Delaware, L. & W. R. Co.*, 238 U. S. 516; *United States v. Lehigh Valley R. Co.*, 220 U. S. 257, or to cases in which the question of "doing business" in a state so as to render the parent corporation liable to suit was involved, such as *Peterson v. Chicago, R. I. & P. Co.*, 205 U. S. 364.

Nothing could better illustrate the common interest of the Texas & Pacific and the International Great Northern than the fact that the Texas & Pacific will not withdraw

from its participation in joint rates and traffic with the International Great Northern to the Texas ports even if it must observe the differentials prescribed by the Commission. In other words, its participation in this traffic is of major importance to the entire system.

The Missouri Pacific undoubtedly has control of the Texas Pacific within the rule laid down by the Supreme Court in *United States v. Union Pacific R. Co.*, 226 U. S. 61, where even a minority ownership of stock was held sufficient. Here as there, a single individual occupied the chief executive position of both companies. (R. 3026) If such a relationship, without any particular evidence that it was being used to achieve the benefits of monopoly, was sufficient to constitute a "unified control which has in its power the suppression of competition" the control of 69.5 per cent of all voting stock is sufficient unified control to place responsibility for the violation of another great statute fraught with as important public consequences, upon the corporation having the power to remedy the violation if it cares to exercise its undoubted power.

It is also a novel theory that by failure to exercise its admitted power to control, a carrier can escape responsibility for a rate policy which violates the congressional prohibition against discrimination. The Texas & Pacific states that a single carrier must have "control" of the rates to both the preferred and prejudiced points. If that is so, we say that the Missouri Pacific has that power regardless of whether it chooses to exercise it.

IV.

Instead of the Export and Import Rates To and From New Orleans Being Equalized With Those To and From the Texas Ports, They were in Fact Grossly Preferential of the Port of New Orleans.

The appellants have asserted that this is not a fact case, and they have attempted to remove it from that sphere by

simply assuming the facts necessary to support their argument even though their assumptions are directly contrary to the findings of the Commission and the evidence of record.

Throughout the briefs of the appellants and the intervenors in behalf of appellants in this case, reference is constantly being made to the equalization of New Orleans with the Texas ports. The court is told that the carriers had pursued a policy of equalizing the rates to and from New Orleans with those applying to and from the Texas ports on export, import and coastwise traffic. In the first place, rates are not equalized in the true sense of the word if one port obtains relatively more service for a given rate than is extended to the other port. In the second place, the policy of equalization implies a policy of like treatment to both parties. Without going into substantial details it is pertinent to outline the treatment accorded to these competing ports by the carriers in the adjustment of rates on this traffic.

a. Even where the distance to New Orleans was as great or greater than that to the Texas ports the carriers maintained lower rates in cents per 100 pounds to and from New Orleans than they applied to the nearer Texas ports.

The record in the original hearing before the Commission abounds with examples of lower rates accorded New Orleans than were accorded Texas ports even though the distance to the Texas ports was substantially less. Where the distance was substantially the same almost invariably the rates to New Orleans were materially lower. The Commission in its first report found that such cases were numerous and cited some illustrations therefrom in the following language taken from its decision reported in 100 I. C. C. 110:

"Analysis of the comparisons in the appendix shows, for example, that *for a difference in average distance of 278 miles in favor of Galveston the average rate* to ship side on sacked grain and flour from points in Texas on the Texas & Pacific, the Gulf, Texas & Western, the Kansas City, Mexico & Orient, the Roscoe, Snyder & Pacific, and the Abilene & Southern *is 1.1 cents less to New Orleans than to Galveston.* From Oklahoma for an average difference in distance of 189 miles the rate to New Orleans is 0.5 cent on flour and 1 cent on grain less to Galveston than to New Orleans. On cotton-seed cake and meal from the 80 per cent group in northeastern Texas the rate to New Orleans is 1.8 cents less than to Galveston, although the average distance favors Galveston by 203 miles. From Oklahoma the average distance favors Galveston by 189 miles, and the average rate to New Orleans is 1.7 cents less than to Galveston. *On bagging the rate to Little Rock, Ark., is 12 cents higher from Galveston than from New Orleans, although the distance is only 23 miles greater.* To *Alexandria, La., the difference in rates on bagging is 30 cents in favor of New Orleans, while the distance favors New Orleans by only 18 miles. These illustrations are typical of many others shown of record.* (R. 3359) (Italics ours)

In the foregoing quotation reference is made to an appendix which was included as a part of the report of the Commission. This appendix is set forth at pages 3364-66 of the record before the court. While it shows that in some instances the rates were higher in cents per 100 pounds to New Orleans than to Galveston it also shows that in most instances although the service was materially greater to New Orleans the rates were as low or lower in cents per 100 pounds than the Galveston rates. For example, the average distance from the Texas cotton mills on cotton yarn, twine and waste to Galveston is 277 miles while to New Orleans the average distance is 534 miles, almost double the distance to Galveston, yet the average rate to Galveston for export was 80.5 cents per 100 pounds while

the average rate to New Orleans was 76.5 cents per 100 pounds. In a table set forth elsewhere in this brief it was shown that the domestic scale of rates on cotton fabrics from Dallas to New Orleans has been fixed by the Commission at 42 cents higher than the domestic rate to Galveston for distances of 290 and 489 miles respectively. Applying the same scale to distances shown in Appendix 1 of the Commission's decision would produce an even greater difference between the Galveston and New Orleans rates under the application of the transportation standard and yet the carriers had not only ignored this enormous difference in the charges which equality of treatment would have required but actually accorded New Orleans substantially lower rates in cents per 100 pounds than was charged the Texas cotton mills when shipping through Galveston.

When we come to points where the distance is substantially the same to New Orleans as to Galveston the difference in the rates in favor of New Orleans becomes very substantial. For example, Little Rock, Arkansas, was 478 miles from New Orleans and 501 miles from Galveston, yet the import rate on bagging from New Orleans was 29 cents per 100 pounds while that from Galveston was 41 cents per 100 pounds. Here the distance from Galveston was 4.8 per cent greater but the rate was 41.4 per cent higher. Practically the same situation existed with ties, coffee and other commodities. To Alexandria, Louisiana, 205 miles from New Orleans and 223 miles from Galveston, the rate from New Orleans was 17 cents per 100 pounds and that from Galveston 47 cents.

A glance at the maps placed in evidence will show that Galveston is considerably further from the eastern Texas, western Louisiana, eastern Oklahoma, and western Arkansas territory than are the other Texas ports. Galveston is 48.6 miles south of Houston and 77.1 miles southwest of Beaumont. Galveston is more distant from the entire territory than any of the other five ports involved all of which

are located within a radius of 52½ miles in Southeast Texas. (R. 501) Generally speaking the export and import rates applicable to the other Texas ports are the same as to Galveston. For example, in the illustration given of Little Rock the distance from Beaumont to Little Rock was only 425 miles or more than 50 miles less than the distance from New Orleans to Little Rock and yet the appellants and other carriers actually maintain lower rates in cents per 100 pounds to and from New Orleans than to and from Beaumont.

b. With certain exceptions the rates from points in Oklahoma and from Texas points 200 miles or more distant from Galveston were either as low or lower to New Orleans than they were to the Texas ports although the service required to New Orleans was substantially greater.

The so-called unrestricted policy of equalizing New Orleans with the Texas ports not only gave to New Orleans much lower rates from territory where the distance was substantially the same as to the Texas ports and lower rates even where the distances favored the Texas ports, but generally speaking the territory contiguous to the Texas ports and remote from New Orleans was arbitrarily made a part of the New Orleans territory by applying the Galveston or Houston rate for the shorter distance to the greater service involved in transportation to New Orleans. The familiar example given of equalization of the export rates to Houston from Dallas by extending the same rates to New Orleans for more than double the distance finds many counterparts from other important interior communities. For example, rates on soap and other commodities involved in the investigation moving from San Antonio, Texas, for export took the same rate to New Orleans even though the direct route lay through the port of Houston. The distance from San Antonio to Houston is 218 miles and New Orleans is 362 beyond Houston from San Antonio. From Austin, Texas, the distance to Houston is 167 miles,

to Galveston 212 miles, to New Orleans 512 miles and yet the New Orleans rates on soap and packing house products were the same as the rates to the Texas ports. (R. 2328-2390) This is what the appellants have termed a policy of equalization but certainly it cannot be stated that it is equal treatment.

c. On export and import traffic moving between the territory which is relatively nearer to New Orleans than to the Texas ports, the carriers not only refused to accord a similar equalization to the Texas ports but charged them rates which were relatively higher for the service performed.

In the original complaint the port of Galveston made an alternative plea. It asked that if the carriers should be permitted to continue to accord New Orleans as low rates as they did the Texas ports where the distance to New Orleans was greater then in such event they should be required to give like treatment to the Texas ports where the distance favored New Orleans. We have already cited some illustrations of very much lower rates to New Orleans where the distances were slightly less than to Galveston. In that part of Louisiana, Arkansas, Missouri, Tennessee, Mississippi and Alabama, where the difference in distance as between the New Orleans and the Texas ports corresponded with the differences in favor of the Texas ports on traffic moving to and from north Texas, Oklahoma and Kansas, the carriers uniformly maintained a very much lower rate to New Orleans and in many instances did not even accord the Texas ports any through export or import rates. The appellants not only participated in practically all of the discriminations which brought this grossly unfair adjustment but their policy, as shown by the record, was largely responsible for the maintenance of such a grotesquely unfair situation.

Witness Thornton presented his Exhibit 33 showing the export rates on cottonseed cake, meal and oil from Ar-

kansas points to the ports of New Orleans and Galveston, also his Exhibit 34 showing similar information as to the import rates on bagging and ties, Exhibit 44 showing similar information as to cottonseed cake and meal from points in Alabama, Mississippi and Tennessee, Exhibit 45 showing similar information on unmanufactured tobacco from points in Kentucky, Exhibit 46 showing rates on iron and steel articles from the Birmingham District and other Southeastern points, Exhibits 38, 39, 40 and 41 showing similar information as to export rates on grain and grain products including flour from points on various lines in Arkansas, Missouri, Oklahoma and Kansas. (R. 327-334)

All these exhibits serve to demonstrate the testimony of the witness to the effect that generally speaking the rates from the Mississippi Valley territory to New Orleans were very materially lower, mileage considered, than the rates applying to Galveston.

They did not even accord the Texas ports the benefit of differentials which would reflect something less than the difference any normal mileage scales would produce.

V.

Not Only Did New Orleans Have a Preferential Advantage in the Rail Rates To and From That Port, but It Also Enjoyed the Advantage of Ocean Rates that Were Generally More Favorable Than Those Available to the Texas Ports.

Notwithstanding the evidence to the contrary, counsel for appellants and intervenors supporting appellants make statement to the effect that the ocean rates to and from Galveston and the Texas ports are the same as those to and from New Orleans. The Commission in its opinion has set forth an analysis of the nature and character of sailings from these ports and generally speaking New Orleans is conceded to be an important port for general

cargo which has the benefit not only of regular lines with regular sailings but numerous irregular lines and tramp lines whereas the Texas ports are largely restricted to the movement of a few commodities which move either in straight cargoes or in sailings by regular lines to a restricted number of ports.

Galveston and Houston are large cotton ports because Texas is the largest cotton producing state and generally speaking cotton rates from a large portion of the territory are lower to Houston and Galveston than to New Orleans. Due to the policy of the Santa Fe in maintaining higher rates to New Orleans than to Galveston coupled with the fact that there is a large local production of grain on its lines in the Southwest, the port of Galveston has been able to develop a substantial movement of grain. Also it has had the benefit of some lower rates on grain from a large part of the Texas producing territory. Sulphur is produced in large quantities in the immediate neighborhood of the Texas ports and consequently moves through those ports. There are very large refineries located at the Texas ports and there is a large import movement of crude petroleum oil and export movement of refined petroleum to and from those ports. There is also a large production of lumber in Southeast Texas in the immediate vicinity of these ports and this produces some export traffic. But what the Texas ports have lacked has been a general line of miscellaneous import and export commodities which make up general cargoes for movement to and from the principal foreign ports. Due to the fact that New Orleans has already developed such a trade in numerous commodities it has been able to reap a great advantage because of the unequal rate policy above specified.

There is no regulatory body clothed with the power to secure to shippers in export and import commerce the benefit of uniform and nondiscriminatory ocean freight rates. Conferences exist which as to some commodities name

maximum rates. These are quoted rates and the record conclusively shows that irregular steamers and tramp lines regulate the rates and make the price of water transportation. (See Appendix 2)

Because of the insistent contention of the New Orleans interests that the water rates from and to New Orleans and the Texas ports are equalized, we have gathered in Appendix 2 the evidence of record which shows quite clearly that there is no such equalization in fact.

The Commission stated in its second report:

> "The maximum ocean rates are fixed by the Gulf Shipping Conference and, except on so-called distress shipments, particularly on grain are generally the same coastwise and foreign from and to all gulf ports."

It is to be noted that the above statement refers to maximum rates and obviously only to members of the Gulf Shipping Conference. Even here the existence of distress shipments at lower rates is recognized and the record firmly establishes the importance of the ocean tramp, with its varying rates, as a factor in the fixing of actual rates.

It would be impossible to make the rail rates to the ports on the basis of the rates enjoyed by the particular shipments beyond the ports, when those rates depend on the unregulated and varying charges of tramp steamers, which is in fact the situation.

The situation is exactly the same as that pointed out by the Court in *Armour Packing Company v. United States*, 209 U. S. 56, 68, as follows:

> "The ocean rate is variable, depending upon the season, weather, and other matters. The steamship must sail at a given date and has a certain amount of space to be filled, so that space may be at one time quoted to one person at one price and at another time to another person at a different price. The question of such rates varies from hour to hour, as well as from

day to day. For these, among other reasons, there was no contract agreement or traffic arrangements between the railroads and export steamship lines."

It is equally apparent that the shipper who could afford to hire a whole ship would be in much better position than the individuals compelled to use the regular lines which on the through rate basis would work an effective discrimination.

VI.

The Orders of the Commission Fall Far Short of Requiring the Carriers to Accord Treatment to the Texas Ports Equally Favorable With that Accorded the Port of New Orleans.

Having shown the many relative disadvantages in the rate structure accorded the Texas ports as contrasted with that accorded by the carriers to New Orleans and having shown that the complaints of the Texas ports and the shippers engaged in business at and through said ports sought a removal of all preference and discrimination, it is interesting to note that nevertheless the Commission has only partly removed the inequalities and that the carriers are still free to accord many preferences to New Orleans. In spite of this the appellants continue to assert that the effect of the Commission's order is to require carriers to charge rates upon an equal mileage basis.

a. The differentials prescribed by the Commission not only are not based on mileage rates, but, in fact, authorize a substantial departure from the transportation standard in favor of New Orleans.

There is a great deal of loose talk in the briefs of appellants and interveners to the effect that the Commission has undertaken in effect to fix a mileage system of rates for application on the export and import traffic involved in this

proceeding. Nothing can be further from the facts and a brief analysis will readily demonstrate this.

To start with, the Commission found that the general transportation conditions in the Southwest were substantially uniform and sufficiently similar to warrant the same level of rates through that part of southwest territory involved in this proceeding.[1] This is one of the findings of primary fact which apparently is not excepted to by appellants when they say that this proceeding, despite the size of the record, "is not a fact case." (Appellants' brief, page 9) This general similarity of transportation conditions has been made the basis for rate adjustments in numerous investigations conducted by the Interstate Commerce Commission, one of the most important being known as *Consolidated Southwestern Cases,* 123 I. C. C. 207, 139 I. C. C. 535. In that proceeding one general level of mileage scales of rates was prescribed for general application through the territory on various classes and commodities. This investigation of rates was based upon a group of complaints alleging discrimination because of disparity in rate levels in different sections of the Southwest, and the Commission in its findings and order virtually prescribed its rate scales as minimum as well as maximum scales, by virtue of its Finding 27, which was set forth in the original brief of these interveners herein at page 38. The traffic involved was domestic traffic, moving between points within the Southwest and interterritorial traffic moving on joint through rates. These scales of rates applied to and from New Orleans and to and from Galveston and other Texas ports on domestic traffic moving locally to and from these points and other points within the Southwest. They mark the ascertainment by the Commission of the transportation standard to be applied within the Southwest, so as to give to each community the benefit of its geographical location

[1] A portion of western Texas known as Texas differential territory takes a higher level of rates, but there was no difference made in the differential because of this fact.

and to eliminate any undue preference or unjust discrimination in the rates applying to and from the several communities. Among the commodities involved were some of the commodities that were involved before the Commission in these proceedings, except that these proceedings involve the export and import rates instead of the domestic rates, and also, rates to the ports on traffic which did not move via through rail-and-water rates.

In order to illustrate the extent to which the Commission has departed from the mileage scales of rates which apply on domestic traffic and has permitted appellants to prefer New Orleans over the Texas ports on import and export traffic, we have selected ten points on the Texas & Pacific Railway in the State of Texas, beginning with Marshall, Texas, near the eastern border of the State, and ending with Sweetwater in the western part of the State. The domestic rates are based on distance and the difference between the domestic rates to New Orleans and those to Galveston and Houston represents the Commission's judgment of what the transportation standard would require, if equality of treatment is to be accorded the respective communities. The tables which follow show the results of comparing the differences in the domestic rates with the differentials which have been prescribed on export and import traffic, and the extent to which the appellants are permitted to depart from the transportation standard or the mileage rates:

TABLES ILLUSTRATING EXTENT TO WHICH THE COMMISSION AUTHORIZED APPELLANT CARRIERS TO PREFER NEW ORLEANS OVER HOUSTON AND GALVESTON ON IMPORT AND EXPORT TRAFFIC, BY PERMITTING THEM TO CHARGE RATES LOWER THAN THE RATES THERETOFORE PRESCRIBED ON DOMESTIC TRAFFIC.

I

BAGGING AND TIES

(Import vs. Domestic)

Destination	Distances Miles New Orleans	Galveston	Houston	Difference in Domestic Rates New Orleans Over: (1) Galveston	(2) Houston	Differentials on Import Rates	Maximum Departure Authorized
Marshall*	338	294	245	6	9	0	9
Forney	465	308	260	15	19	6	13
Terrell	454	296	248	10	13	6	7
Dallas	489	290	242	16	19	6	13
Ft. Worth	520	307	259	15	19	6	13
Honey Grove	478	369	321	11	14	6	8
Denton	526	328	280	14	18	6	12
Cisco	635	381	334	16	20	6	14
Abilene	581	426	378	14	17	6	11
Sweetwater	722	456	408	13	15	6	9

*No differential is required to Marshall.

II

SOAP

(Export vs. Domestic)

Origin	Distances Miles New Orleans	Galveston	Houston	Difference in Domestic Rates New Orleans Over: (1) Galveston	(2) Houston	Differentials on Export Rates	Maximum Departure Authorized
Marshall*				8	12	0	12
Forney		Same		20	25	6	19
Terrell		as		13	17	6	11
Dallas		Table		21	25	6	19
Ft. Worth		I		20	25	6	19
Honey Grove		above.		15	18	6	12
Denton				18	23	6	17
Cisco				21	26	6	20
Abilene				19	23	6	17
Sweetwater				18	20	6	14

*No differential is required to Marshall.

III.

COTTON FABRICS

(Export vs. Domestic)

Origin	Distances Miles New Orleans	Galveston	Houston	Difference in Domestic Rates New Orleans Over: (1) Galveston	(2) Houston	Differentials on Export Rates	Maximum Departure Authorized
Marshall*				17	21	0	24
Forney		Same		38	49	12	37
Terrell		as		27	34	12	22
Dallas		Table		42	49	12	37
Ft. Worth		I		38	49	12	37
Honey Grove		above.		29	35	12	23
Denton				35	45	12	33
Cisco				41	51	12	39
Abilene				36	45	12	33
Sweetwater				34	38	12	26

*No differential is required to Marshall.

As illustrative of the above let us take Dallas, Texas, which is the largest and most important commercial and industrial center in the interior of the Southwest. Dallas is 242 miles from Houston, 290 miles from Galveston, and 489 miles from New Orleans. The Commission prescribed a mileage scale of rates on bagging and ties which applies from New Orleans, Galveston, and Houston to Dallas. Under this scale the rate from New Orleans to Dallas is 19 cents per 100 pounds higher than that from Houston to Dallas, and 16 cents higher than that from Galveston to Dallas. However, on import traffic, the appellants are permitted to depart from this standard and to charge rates from New Orleans which are only 6 cents per 100 pounds higher than the contemporaneous rate charged on import traffic from Houston and Galveston to Dallas. A maximum departure from the scale amounting to 13 cents per 100 pounds is authorized. In the case of Galveston the departure would be 10 cents per 100 pounds.

In the case of soap moving for export from Dallas, which is a producing point for soap, the appellants are permitted to charge rates to New Orleans which are only

6 cents per 100 pounds higher than the rates to Galveston and Houston, but the domestic rate to New Orleans, which represents the transportation standard, is 21 cents higher than the rate from Dallas to Galveston and 25 cents higher than the rate to Houston. A maximum departure of 19 cents per 100 pounds is authorized in this case. In the case of cotton fabrics, which are also produced at Dallas, the appellants are permitted to charge export rates which are only 12 cents per 100 pounds higher than those applying to Houston and Galveston, whereas, the domestic rate to New Orleans is 42 cents per 100 pounds higher than that to Galveston and 49 cents higher than that to Houston.

The city of Marshall, Texas, is also included in the tables above for the purpose of showing that although there is a substantial difference in the domestic rates fixed by the Commission, nevertheless on the import and export traffic the appellants are permitted to disregard this difference and charge rates that are no higher than those applicable to and from the Texas ports. For example, Marshall consumes bagging and ties and the local rate from New Orleans is 6 cents higher than that from Galveston and 9 cents higher than that from Houston; yet, on import traffic, the appellants are permitted to charge rates that are no higher than those from the Texas ports.

b. The orders of the Commission left a wide latitude of discretionary power to appellants to extend more favorable rates on export, import and coastwise traffic to the port of New Orleans than to the Texas ports.

We have already seen that as to the so-called differential territory the orders of the Commission permit the appellants to publish relatively lower rates to New Orleans on export and coastwise traffic than are contemporaneously maintained to the Texas ports. In other words, the differentials prescribed do not measure the additional service involved. Outside of the differential territory the

carriers are given a substantial leeway to favor New Orleans in such rate adjustments.

The complaint before the Commission involved the rate adjustment to and from the territory immediately north of the port of New Orleans as well as that immediately north of the port of Galveston and to the Southwest territory generally. As to the territory north of New Orleans, in Mississippi, Tennessee, eastern Arkansas and eastern Louisiana, it was shown that the rates were substantially lower to New Orleans than to the Texas ports, but that the short-line distance was also less to New Orleans. Even though these rate differences were very substantial the Commission did not require them to be reduced to the amount of the differentials which they prescribed to and from the territory in Texas and Oklahoma where the distance was correspondingly shorter to the Texas ports. In other words, the carriers were left free to continue their policy of favoring New Orleans with lower rates from all the territory where the distance to New Orleans was less than the distance to Galveston. As Galveston is the most distant of the Texas ports from such territory, it follows that relatively higher rates can be charged to and from the other Texas ports on traffic originating in or destined to the territory where the distance is less to New Orleans than to Galveston. For example, the distance from Alexandria to New Orleans is 205 miles and from Alexandria to Galveston it is 223 miles, but the carriers are permitted to continue to accord lower rates to New Orleans than to Galveston without any kind of restraint being placed thereon by the decision and order of the Commission. Not only this, but they can also charge lower rates from Alexandria to New Orleans than to Beaumont, although the distance from Alexandria to Beaumont is 153 miles, or substantially less than the distance to New Orleans. There are a number of important cities in Louisiana and Arkansas where New Orleans will reap the benefit of the favoritism thus permitted by the Commission.

There is also a very important territory where the distances to New Orleans are as great or greater than the distance to Galveston and where this difference does not exceed 25 per cent of the distance to Galveston. All of this territory is even nearer to the other Texas ports than it is to Galveston, and yet, here again, the carriers are permitted to equalize New Orleans with its greater distance.

A patent illustration of the extent to which appellants are still permitted to prefer New Orleans is the City of Shreveport. This is the largest and most important commercial and industrial community in the State of Louisiana, outside of the City of New Orleans. It is located within twenty miles of the eastern boundary of the State of Texas and, under a Section 3 order in the Shreveport case (*Railroad Commission vs. Aransas Harbor Terminal Railway*, 23 I. C. C. 31, and 48 I. C. C. 312), was given, mile for mile, the same rates on traffic moving between Shreveport and points in Texas as the carriers accorded to producing and consuming communities in Texas on intra-state traffic. Shreveport is 223 miles from Houston, 209 miles from Beaumont, and 327 miles from New Orleans. Due to the fact, however, that the distance from Shreveport to New Orleans is less than 25 per cent greater than the distance to Galveston, the Commission not only permits the appellants to charge as low rates to New Orleans as to Galveston, but as low as they charge to Houston and Beaumont, although the distance to New Orleans is forty per cent greater than that to Houston and fifty per cent greater than that to Beaumont.

Numerous other important illustrations might be cited from towns and cities in northeastern Texas, eastern Oklahoma, western Arkansas, and western Louisiana. Such territory includes such important communities as Marshall, Texas; Texarkana, Arkansas; Tulsa, Oklahoma; Fort Smith, Arkansas; Van Buren, Arkansas; Joplin, Missouri; Kansas City, Missouri; Kansas City, Kansas; all of which

are substantially nearer to the Texas ports than they are to New Orleans. The appellants participate in the rates to and from these points, to New Orleans and from and to some or all of the Texas ports.

In other words, because of the consideration given by the Commission to the numerous factors which affect this traffic, the Commission finds that in such cases the preference extended by the carriers to New Orleans would not be undue nor the discrimination against the Texas ports unjust and therefore not in violation of Section 3.

VII.

The Primary Findings of Fact by the Commission Fully Support its Ultimate Findings of Fact and the Existence of Undue Preference or Unjust Discrimination is Determined as a Matter of Fact Upon the Evidence Submitted Peculiar to Each of the Commodities Involved.

In the briefs previously filed with the court numerous references were made to the record to show the evidence submitted with respect to each issue and with respect to each commodity. However, the position taken by the appellants under which the basic or primary findings of fact are not questioned makes it unnecessary to reiterate such references. Appellants' briefs wholly fail to show a résumé of the primary findings of fact and fail to demonstrate how the ultimate findings of fact are contrary to the primary findings of fact. Just what facts are primary facts under their category is not clear.

The Commission found that relatively lower rates were being accorded New Orleans than were accorded to the Texas ports and this finding is certainly one of primary fact. It found that the transportation conditions were substantially similar throughout the territory or at least not so dissimilar as to warrant a different level of rates to New Orleans from that applicable to the Texas ports.

This also must be a primary finding of fact. It also found that the cost and value of the service to New Orleans was greater than the cost and value of the lesser service to the Texas ports which also is evidently a primary finding of fact. It also found that by reason of the relatively lower rates exporters and importers of the Texas ports were seriously handicapped and the development of such ports seriously deterred, which also constitute primary findings of fact. It also found that some allowance should be made, to the carriers serving New Orleans, for the competitive character of the commerce and that a mere difference in rates or service did not constitute unjust or undue discrimination. This is in line with the contention of appellants and no doubt will be considered as a finding of primary fact. However, when the Commission finds that a substantial difference in the service amounting to more than 25 per cent should be reflected to some degree in the rate adjustment this becomes an ultimate finding of fact which according to appellants is not supported by substantial evidence.

We have a voluminous record and the reports of the Commission show a careful consideration of numerous matters some of which it cast aside as having little or no weight and others it considered of great importance. Those matters which were cast aside as having little or no weight were the superior advantages of the port of New Orleans and among those matters which were considered as being entitled to consideration was the fact that the commerce had a movement beyond the ports. Not only this but the Commission considered the facilities and the peculiar conditions surrounding each particular commodity in very great detail and undertook to reach a conclusion as to each commodity in accordance with the primary facts or evidence submitted with respect thereto.

The appellants pretend to be unable to understand why the Commission should fail to find a violation of Section 3

with respect to the rates on petroleum and its products while at the same time they find that there is a violation of the section with respect to the rates on other commodities. They assume that in the case of all commodities all of the competitive conditions which affect the transportation and all of the conditions which go to the measure of the preference which may be considered as lawful must be identically the same. The Commission on the other hand, has in this case gone into all of these elements which the supreme court enumerated as proper for consideration in the old import rate case, *Interstate Commerce Commission v. The Texas & Pacific Railway Company*, 162 U. S. 197, in which it was stated that the Commission should consider all of the facts, not only the welfare of the carriers, the consumers and the recipients of the merchandise but also the shippers and merchants at the ports and the general interest of the public. The court might have properly added to this enumeration the facilities for handling the commerce involved. In the case of all of the commodities the Commission went thoroughly into the evidence as to the available facilities for handling the commerce, and it found that in the case of petroleum and its products there were substantially no public facilities at the Texas ports for handling this commodity and certainly in the absence of such facilities there could not be said to be an undue preference in favor of New Orleans and an unjust discrimination or injury to the exporters and to the Texas ports. The very fact that the Commission exempted this commodity shows how carefully it was going into all of the details surrounding the movement of commerce and the conditions pertaining thereto as to the several commodities. (See also pp. 60 to 68 of original brief of these interveners)

In the case of grain the record shows that the exporters of grain at New Orleans have available to them the grain originating in the Mississippi and Missouri valleys which

moves to New Orleans on substantially lower rates than applied to the Texas ports which grain contains a relatively higher percentage of moisture than the grain originating west of the Missouri River and in Oklahoma and Northwest Texas. By a blending of the two they are able to make a profit on the export blended grain which is denied to the exporter at Galveston who cannot obtain the grain with moisture except at a very much greater transportation cost. This evidence was submitted for the purpose of showing that the differentials prescribed by the Commission on grain in its original decision were reasonable and could not have the result of preventing New Orleans from participating in the commerce originating in the differential territory in Oklahoma, Kansas and Texas. (R. 2152) Nevertheless the Commission weighed the reasonableness of the differentials and very substantially reduced the differentials which it had previously fixed on grain. For example, as to grain originating in western Texas it had originally prescribed a differential of 5 cents and this was reduced to 2 cents per 100 pounds except as to that portion of Texas on and north of the line of the Rock Island Railway running through Amarillo, Texas, as to which territory it was reduced to 1 cent per 100 pounds. As to Oklahoma it had originally fixed a differential of 4 cents on grain and this was reduced to 2 cents in the southern half of the state and 1 cent in the northern half of the state. From the principal grain producing territory in Kansas it had originally prescribed a differential of 3 cents but in its final report it restricted this territory to a portion of South Central Kansas and made the differential 1 cent.

Therefore although the Commission found that the result of its original differentials would not be to deprive New Orleans and the appellants from participating in the movement of the export and import traffic involved, nevertheless it very substantially reduced the differential on this as

well as other commodities. The limits of this brief will not permit us to go into all of the details of the voluminous evidence bearing on grain alone nor reflect the painstaking detail with which the Commission has analyzed and reached its conclusions with respect to reasonable and proper differentials to prevent unjust discrimination.

In the case of grain the difference in the mileage based upon scales which had been approved by the Commission prior to the order of 1927 would produce differences in the domestic rates ranging from 6 cents to 20 cents per 100 pounds and yet the appellants are permitted to depart almost entirely from this transportation standard and only negligible differentials are required.

The decision of the Commission makes it very evident that the Commission is trying to reach a solution of the problem which would permit the export and import traffic to move freely through all the ports and yet protect each of the ports by preventing it from being deprived of all of the benefits of its geographical location. Had its first order gone into effect and the differentials therein prescribed been applied to the traffic and if upon trial thereof the carriers had found that it absolutely prevented the appellants and the port of New Orleans from enjoying any share of the commerce in these commodities in the great Southwest, then they could have come back to the Commission, filed their petition or filed their tariffs, and presented to the Commission evidence upon which the Commission could have revised the differentials. As it was they applied to the Commission before the order became effective and the Commission reopened the case and never required the order to be performed. It very substantially modified its original order. The appellants and the other interests still have available to them recourse to the Commission if the existing differentials are shown to have such an effect as that described in their petition. If the experience of the carriers in handling the export and import traffic is

such that they can show to the Commission that the leeway of twenty-five per cent is not sufficient then without a doubt the Commission would grant them proper relief. Instead of this they come before the court and ask the court to set aside the action of the Commission in exercising its judgment. They say that it is not a fact case and that the findings of fact by the Commission have been justified by substantial evidence of record but that the ultimate fact, (the conclusion) a finding of undue preference or unjust discrimination, is erroneous and not warranted by the primary findings of fact.

They do not dispute the enormous rate advantages and preferences which have been described in this brief. All of these are matters of record. They do not dispute the testimony of exporters and importers at the Texas ports who describe their inability to obtain traffic and the losses that they have sustained by reason of this unjust rate adjustment. The difference in the service as reflected by the difference in the short line distance to the ports has been set forth by the Commission and is one of the primary facts which they concede to be supported by substantial evidence. Furthermore they do not dispute that every witness who was interrogated upon the subject admitted that somewhere there should be drawn a line beyond which the carriers should not be permitted to meet the rates of the nearby port for application to far distant ports. They must concede that the only body upon whom Congress has conferred the discretionary power to fix the line is the Interstate Commerce Commmission and having conceded this it is submitted that they cannot expect this court to set aside the exercise of discretionary judgment by the Commission.

VIII.

The Mere Fact That the Commission may Apply a Different Standard in Other Cases Involving the Fourth Section of the Interstate Commerce Act is no Legal Ground for the Court to Enjoin its Exercise of Judgment in Administering Section Three of the Act as Each Case Must be Considered Upon the Facts Presented in Such Case.

This subject was discussed at pages 68 to 72 of the original brief filed by intervenors herein and is also discussed at page 88 of the supplemental brief for carriers intervening in support of the supplemental order of the Commission. It is unnecessary to reiterate this argument. The original contention of appellants related primarily to an argument that the commission in administering the fourth section permitted the longer line or route to meet the rate of the short route where the difference in distance was much greater than twenty-five per cent. Such finding dealt primarily with the compensatory feature of the rates but as this court has frequently held, both rates may be compensatory and yet be in violation of Section 3(1).

In their supplemental briefs, the appellants and the Port of New Orleans make the contention that the findings and order of the Commission in this case are inconsistent with its findings and orders in *Fourth Section Application No. 2040, "Export and Import Rates to and from South Atlantic and Gulf Ports,"* 169 I. C. C. 13. In the first place, the instant case involves a formal complaint of a violation of Section 3 and the competitive relationships between the shippers, as well as the ports and other interests thereat, as affected by that section constituted the basis of the inquiry. In Fourth Section Application No. 2040 the Commission had before it an application of certain carriers for permissive authority to depart from the long and short haul requirements of Section 4 of the Act. In other words,

they were undertaking to show that it involved a "special case" for consideration under the discretionary power granted the Commission to authorize Fourth Section departures. At page 36 of the decision the Commission says:

> "The scope of this proceeding, however, is limited by the relief prayed by the carriers, who alone are authorized to file applications for relief under Section 4."

Again, at page 52, the Commission says:

> "However, this is not a proceeding for the purpose of equalizing the foreign commerce of the various ports but one to determine whether disadvantages alleged to be suffered by certain carriers in competing with other carriers for traffic which may be handled by both are of such a nature and extent as to make the situation a special case within the meaning of section 4 and to warrant relief from the long-and-short-haul provision of that section. Incidentally this may affect the commerce handled through certain ports. The object of the carriers seeking the relief is to retain and if possible increase the traffic moving over their lines. If the relief should be granted and they are successful in their efforts to secure additional traffic, commerce now moving or which might move through some ports would be diverted through others. That the proposed rates might have that result, however, is a matter for consideration in this case only to the extent that it may affect the determination of the question as to whether those rates would result in undue preference of some ports and undue prejudice to others."

While certain of the carriers made the contention that the proposed adjustment would unduly prefer the southern ports, the Commission, upon the facts shown in that cause, found that the appellant carriers had made a special case under which they should be permitted to charge higher rates at intermediate points on export and import traffic. The nature of the cases is substantially different and, even

though it be conceded that Section 3 was incidentally involved in Fourth Section Application 2040, the mere fact that the Commission failed to find under the record there made, that there was an undue preference involved in the proposed rates, can have no possible bearing upon the question as to whether or not the record in this case supported the findings of the Commission. Even in this case, because of the facts shown, the Commission found that as to the rates on petroleum there was no undue preference or unjust discrimination. This merely demonstrates what the court has repeatedly stated, namely, that the determination of undue preference and unjust discrimination is a question of fact which must be determined by the evidence presented in the particular proceeding.

IX.

There is no Support for the Continued Assertions of the Appellants That the Purpose and Effect of the Commission's Order is to Deprive New Orleans of the Opportunity of Participating in the Export and Import Commerce and Deprive Appellants From Transporting the Same To and From New Orleans.

In their supplemental brief (page 11) the appellants state that "the effect of making the New Orleans rail rates higher than the Galveston rail rates is * * * to force the traffic to move through the latter port" and that "the question is not whether the traffic will move nor upon what rates, but whether it will be given the option of moving through New Orleans or will be confined to the Texas ports and whether these appellants will be given an opportunity to participate in the movement of this commerce or will lose it to other carriers serving the Texas ports." This is the gravamen of their whole complaint and it is predicated upon the assumption first, that there is no difference in the water rates beyond the respective ports; second, that any difference whatever in the rail rates will prohibit

them moving the traffic through New Orleans; and third, that if it does not move through New Orleans the appellants will not get to participate in it.

As to the first assumption we have already shown that there is no uniformity in the ocean rates and that New Orleans has vastly superior advantages not only in the opportunity to get cheaper rates but also in the greater number and variety of sailings to a greater number of ports and a greater frequency of sailings. The second assumption was the subject of careful investigation by the Commission and as a result thereof the Commission very substantially reduced the differentials fixed in its original order. Not only this but the Commission specifically found as a result of its exhaustive investigation that because of the numerous advantages possessed by New Orleans and their superiority over those of the Texas ports "that an affirmance of the findings of the original report would not be likely to cause serious injury to the port of New Orleans." (128 I. C. C. 369) In other words, the Commission although it did not consider the commercial advantages of New Orleans as determinative of rate relationship nevertheless found that the result of the differentials would not be to actually deprive the port of New Orleans and the appellant railroads of enjoying a healthy share of the traffic.

The third assumption to the effect that appellants would not get to participate in the traffic after it moves to the Texas ports is rather amusing in the light of their insistence that they must continue to participate in the rates on export and import traffic through the Texas ports. If they find it so necessary to continue this participation in the rates to and from the Texas ports certainly it would seem that they are expecting to continue to enjoy a portion of such traffic.

Back of the whole contention of appellants lies their assumption that they are entitled to meet whatever rates

may be applied to and from the Texas ports irrespective of any difference in service, or the fact that traffic may be originating in territory actually contiguous to the Texas ports and consequently remote from New Orleans. In other words, their position is that they have an unlimited right to prefer the port of New Orleans irrespective of the effect it may have upon the competitive ports in Texas. Of course, this applies in like manner to the shippers engaged in export and import commerce at New Orleans and at the Texas ports. In their brief appellants cite the reply of the Commission to this contention as proof of their assertion that the Commission is merely trying to take away from New Orleans its natural and commercial advantages or to offset them by preferential rate adjustment to the Texas ports. We submit that the answer of the Commission to this is elementary if the ports and the shippers at the ports are to be regarded as entitled to the protection of Section 3 of the Interstate Commerce Act. The Commission's answer is quoted in the brief of appellants and as shown in the decision of the Commission at 128 I. C. C. 369, is as follows:

> "* * * Healthy competition is no less important between ports than between rail or water carriers. There is, however, a limit beyond which the disregard by rail carriers of the geographical advantages of one port in favor of another will impair rather than promote healthy competition between the ports. There is much ground for believing that a policy of port equalization, if carried beyond reasonable limits, has the effect of strengthening unduly, at the expense of others, those ports which by reason of natural or acquired advantages have attained commanding positions in the export and import trade * * *." (Record 3391)

X.

The Commission Did Not Ignore the Interests of Interior Shippers but on the Contrary its Action in Ordering the Undue Prejudice Removed was Widely Supported by Such Shippers Whose Interests Were Served by the Consequent Reductions to the Texas Ports.

Another impression which appellants seek to give the Court is that the Commission has failed to consider the interests of the interior shippers. To the contrary, the record demonstrates a wide-spread support of the Galveston position on the part of the interior shippers. It also shows that compliance with the 1927 order was achieved for the most part by reduction of rates to the Texas ports, and not by an increase in rates to New Orleans.

Among the interior interests supporting the Texas ports were:

Oklahoma Cottonseed Crushers Association, consisting of all the oil mills in Oklahoma. (Witness Johnston, Record 432)

Waco, Texas, Chamber of Commerce, (Witness R. G. Hyatt, Record 529)

Fulton Bag & Cotton Mills, Dallas, Texas. (Witness Shirley, Record 534)

The Texas Chamber of Commerce. (Witness Leffingwell, Record 608-610)

The Texas Industrial Traffic League, an organization of all the larger chambers of commerce in Texas and individuals, firms, and corporations in all sections of Texas. (Witness Leffingwell, Record 1627, 1639)

Wichita, Kansas, Board of Trade. (Witness Rader, Record 1654)

Chamber of Commerce, Hutchinson, Kansas. (Witness Russell, Record 1679)

Farmers National Grain Dealers Association. (Witness Brown, Record 1704)

Farmers Cooperative Commission Company. (Witness Megaffin, Record 1711)

Kansas State Farm Bureau. (Witness Snyder, Record 1721)

Fort Worth Grain & Cotton Exchange. (Witness Wyatt, Record 2122-3, 2126; and Witness Simons, Record 2133)

Frank Kell, large exporter and miller. (Record 2130 *et seq.*)

Red Star Milling, Wichita, Kansas.

Kansas Milling Company, Wichita, Kansas.

Consolidated Flour Milling Company, Hutchinson, Kansas.

Kelly Milling Company, Hutchinson, Kansas.

Goerz Flour Milling Company, Newton, Kansas.

(Witness Moffett, Record 2897.)

That the adjustments required by the Commission's 1927 order were made largely by reductions is also apparent from the record.

"I think, generally speaking with respect to most of the other traffic (other than oil), the adjustment was brought about by reductions in the rates to Galveston. Certainly so, on grain, cottonseed products and numerous other important commodities." (Witness Hershey, Record 2338)

"Cottonseed cake and oil rate adjustment was made by reductions." (Witness Bothwell, Record 2356)

"Both advances and reductions were made on bagging to comply with the order in 12795." (Witness Bothwell, Record 2371)

XI.

The Order of the Commission in Docket 20685 is Supported by Substantial Findings and Evidence, and Appellant Carriers can be Required to Cure the Undue Prejudice and Preference There Condemned.

The order of the Commission in Docket 20685, which required the carriers to cease and desist from charging to Waco rates on green coffee from New Orleans exceeding those charged to Dallas and Fort Worth, followed the complaint of certain of these interveners engaged in the coffee roasting business at Waco. The Commission found that these complainants were compelled to pay a prejudicial rate of 57.5 cents for a haul of 518 miles while competing coffee roasters at Dallas and Fort Worth were charged only 48.5 cents for hauls of 489 and 520 miles respectively under substantially similar conditions. (Record 3054, 3447.) The fact situation depicted by the Commission presents a clear case of undue prejudice and preference, and is fully supported not only by the evidence introduced by the particular complainants but by the record in Docket 12798 which upon stipulation of counsel was made a part thereof.

The contentions advanced by the Texas & Pacific in attack upon this order are substantially the same as those raised against the order in Docket 12798. That carrier does not serve Waco with its own lines but participates in joint through import rates from New Orleans on green coffee to Waco. (Texas & Pacific Original Brief, page 224.) Its primary contention is that having no exclusive control of the rate to Waco, it cannot as a matter of law be guilty of undue prejudice. This legal contention is adequately dealt with in connection with the 12798 order.

Perhaps we should point out in addition that counsel is mistaken in the statement that the fact situation is exactly parallel with that before the court in *Philadelphia & Read-*

ing Ry. v. United States, 240 U. S. 334. It would be parallel had the Commission found that the maintenance of the rate of 57.5 cents to Waco from New Orleans and of 48.5 cents to Fort Worth from New Orleans discriminated against and was prejudicial to New Orleans; but as pointed out above the Commission found that it was prejudicial to Waco and preferential of Fort Worth and Dallas.

It is also true as pointed out at page 228 of the original Texas & Pacific Brief that the extent of the prejudice has been somewhat modified as a result of the charge in the import rates from the Texas ports following the revision of the domestic rates in the *Consolidated Southwestern Cases;* but the application of those rates does not correct the undue prejudice to the extent it was found to exist by the Commission and obviously this court will not undertake to revise the judgment of the Commission on that point.

CONCLUSION.

The decree of the lower court denying the prayers for injunction and dismissing the petitions for want of equity should be affirmed.

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Washington, D. C.,
October 6, 1932.

Fulbright, Crooker & Freeman,
Of Counsel.

APPENDIX 1.

Evidence Showing Direct Shipper Interests Doing Business at the Ports.

The variety of shipper interests located at the ports who were concerned in the complaint and protected by the Commission's order is shown by the testimony to which we will refer.

E. H. Thornton presented much detailed testimony on behalf of the Galveston Commercial Association. He testified that:

> "The Galveston Commercial Association is composed of various shipping and general commercial interests, including persons interested in import and export and coastwise traffic through the Port of Galveston, including exporters, steamship agents, cotton brokers, and exporters, and so forth. (Record, 289)
>
> "The Galveston Commercial Association is composd of all of the commercial interests of the City of Galveston, including grain exporters, cotton exporters, and exporters of all kinds of commodities, steamship agents, and bankers (fol. 515); they are limited to the City of Galveston. No members are located in various parts of the state unless they have an office in Galveston." (Record 342)

That the exporters at the ports actually buy and ship the commodities handled is shown by the following extract from his testimony:

> "Exporters buy commodities outright and pay the transportation charges to Galveston. Sometimes they will buy these commodities delivered to Galveston, and that freight is taken into consideration when they buy these commodities. They do not consume them here; they are exported, and they are held in storage in some cases for great lengths of time. The traffic moving through Galveston is sold to foreign countries, and the man on the other side may pay the freight. I think

that is the case in cotton and many other cases." (Record, 344)

At record page 358, he testified the Galveston Commercial Association were speaking on behalf of Mr. Guhlman, one of the largest exporters of cotton seed meal in Texas, who has his office in Galveston and has for many years.

Witness W. R. Scott, testifying for the Board of Trade of Kansas City opposed Galveston's complaint, but testified:

> "A particular exporter, however, may have his arrangements for shipping through one or the other port. One firm, Hall-Baker Grain Company, ships largely through New Orleans. Two other firms the Rosenbloom Grain Company and the Armour Grain Company, operate elevators at Galveston and Texas City, respectively." (Record 378)

The capacities of the various elevators at the ports is shown on the same page of the record.

The testimony of Witness Johnston, representing the Oklahoma Cotton Seed Crushers Association, which supported the complaint, shows that the export rates to the ports are a factor to be considered in determining whether the exporter located at Houston or at New Orleans would buy the cotton seed oil. (Record, 439) The American Cotton Oil Company and the Southern Cotton Oil Company have their refineries at New Orleans, and there are independent refineries at Houston. (Record 441, 442.)

Witness H. H. Haines appeared on behalf of the Houston Chamber of Commerce (Record 445), and Beaumont, Orange and Port Arthur, (Record 451). He testified:

> "I think there are four or five vegetable oil refineries at Houston. The Houston Packing Company and the Magnolia Provision Company have quite large refineries there; they handle cotton seed oil, peanut oil, and similar products handled by the refineries at New

> Orleans. I represent the Houston Chamber of Commerce and the City of Houston. The two concerns mentioned are members of the Houston (fol. 778) Chamber of Commerce and supporting this proposition." (Record, 501)

Witness D. S. Cage, testified he was engaged in the exporting and importing business and had been president of the Houston Chamber of Commerce. He is engaged in the export of rice products, corn, cotton seed products, and in the importation of molasses. (Record, 465, 466) He further testified:

> "There are other merchants at Houston and these other Texas ports that are interested in a general line of export commodities; they have investments in this territory and in common with the people who reside at these other ports are united in the efforts to build up these ports. Along with other people in Houston, I have been engaged, in a general way, myself trying to build up the port." (Record, 466)

Witness R. G. Hyatt, representing the Waco, Texas, Chamber of Commerce and numerous concerns doing business there stated:

> "We are interested in building up the Texas ports, and as an illustration we are at the present time interested in securing available storage space for green coffee. The members of our concern also import bagging for the baling of cotton, this product being stored at the Texas Gulf ports (fol. 823) until it is used or demanded at the interior; this storage at the Texas Gulf ports can be attributed to the low rates of storage and also to the insurance rate. When this bagging is purchased it is very difficult to determine at what point it will be consumed; therefore we are vitally interested in the development of the Texas ports on account of their nearness to Waco, Texas." (Record, 529)

Witness William C. Ermon, traffic manager of the Southern Oil Company, testified on behalf of the American Oil

Company and several cottonseed oil refineries located in New Orleans. (Record 557.) At page 566 he testifies:

> "If there were a preferential rate adjustment to the Texas ports it would be a very serious detriment to the refineries within the New Orleans port limits, because it would deprive them of this oil output that is available in Texas. * * * If oil for Rotterdam, for example, is available for movement through New York, Portsmouth, Savannah, New Orleans, Galveston, whichever refinery is located or adjacent to these ports is capable of taking care of the business at least expense, and the orders will go to that refinery."

At page 569 he testified further that the crude cotton seed oil moved to the ports from the interior, is refined at the ports and the refined oil exported.

Witness Barnett, representing the Southern Oil Company, testified that one exporter maintained a grinding plant for cottonseed cake at Galveston. (Record, 1473) He further testified:

> "We buy our product all over the states of Texas and Oklahoma where we can buy profitably, and where the rate structure will permit us to do so. You see, in buying this cake in Texas and Oklahoma, we compete with the Texas ports, and we have to meet what they bid out there in order to do the business. Our headquarters are here in New Orleans." (Record, 1474-5.)

Ed. P. Byars, a witness for the Texas Cottonseed Crushers Association, testified that:

> "The Magnolia Provision Company at Houston, an oil company, would naturally want a lower rate through Galveston; they would be entitled to it. They bring oil from North Texas, barrel it, transit it, and export it right straight out." (Record 601)

He also testified that there was competition between exporters of cotton seed located at Galveston and at New Orleans. (Record 601-2)

H. Guldmann supported the Texas port complaint testifying that he was located at Galveston and doing business in Galveston as an exporter of cotton seed cake and cotton seed meal; that five other exporters competed with him at the Texas ports, and that he bought his products delivered at Galveston and that 90 per cent of the trades were made in Galveston.

J. A. Lynch for the Texas & Pacific testified that:

> "On the Texas & Pacific terminals within the New Orleans port limits there are numerous firms and industries which handle both export and import commodities, such as cotton seed products, petroleum products, grain and grain products, sugar and molasses, bags and bagging, cotton and other articles. There are also very large storage warehouses and other facilities provided for the handling of this class of traffic." (Record 750)
>
> "* * * Two large grain elevators are included in the Westwego terminal facilities with a combined capacity of 1,380,000 bushels." (Record 751)

E. E. Gossrau, for the Galveston Wharf Company testified that that company handled grain for the public in its two elevators having a capacity of 2,150,000 bushels. He testified that Rosenbaum operated the Sunset Elevator, a private concern, with 1,000,000 bushels capacity. (Record 832)

Joseph Lallande, representing the Southern Pacific, testified that:

> "We are very apprehensive that if this business is diverted from New Orleans as a (fol. 1805) result of prescribing of differentials New Orleans higher than Galveston, that the particular business that we secure to New Orleans will not be secured for our lines to Galveston in every instance, or in a great many instances. We have connections with exporters at New Orleans by which we secure competitive business. There is no assurance that we are going to get that

> particular business—when I say we, I mean the Texas System Lines—will get that particular business if it goes to a Texas port." (Record 1142.)

Carl Giessow representing the New Orleans Joint Traffic Bureau introduced an Exhibit Number A-136, giving a list of the importers and exporters located at New Orleans, including a total of 434 parties whom he testified had an interest in the outcome of the proceeding. (Record 1203-4.) He further stated:

> "They are the people who are interested in the development and handling of foreign trade to the port and from the port. Some of them are manufacturers. Some of them are merchants. Some are brokers. But they represent what we understand are our import and export people." (Record 1203)

The testimony of Witness Pedrick at Record 1440 is also interesting to show that the ports constitute something more than a gateway in handling coffee:

> "Now I do not know of any port where they can use just one straight brand of coffee. They have to blend it. Now, for instance, coffee that we bring up here from Brazil may go into a warehouse and it is not shipped out direct in a straight carload lot, but there are certain other grades different grades of mild coffee, mixed with that and shipped out."

Witness Westfeldt, a coffee commission merchant, testified that the importers carried large stocks of various kinds of coffee at the ports and that each roaster in the interior had his own particular types of blend. (Record 1616-17)

Companies engaged in repairs to vessels are located at the different ports, according to Witness Mallyn (Record 1619, *et seq.*) and are part of the general port interests.

Witness Hogsett's testimony throws considerable light on the manner in which the importation of burlap bags and bagging is handled:

> "Bags are used extensively throughout Texas, Oklahoma, Southern Kansas, Southern Louisiana, and in Arkansas by flour and cotton seed mills, grain and rice dealers and farmers, as well as many other people. They ship flour in cotton lined bags. Burlap bags are manufactured by and dealt in by six concerns in Houston, some of which ship or attempt to ship to customers in Texas, Louisiana, Oklahoma, Arkansas and Southern Kansas." (Record 1942)

F. A. Farda, Manager of the Standard Rice Company, Houston, Texas, testified they had a rice mill plant at Houston and were engaged in the export of rice in competition with the rice millers at New Orleans. (Record 2017, 2021.)

C. C. Chamberlin testified to the location of the permanent organization and warehouse of the Ludlow Manufacturing Associates at Galveston for the importation of bagging as follows:

> "We do not import any bagging through New Orleans. My company does not. We located at Galveston instead of New Orleans when we established our base of distribution at Galveston in 1922 because we had then, and now maintain, an organization here. Prior to 1922, we had not only that permanent organization here, but warehouse facilities which had been used in distributing from this port our bagging made in Ludlow. When it became time to arrange for the import product, naturally Galveston was the logical place. We had had a place of business here for many years. In 1922 the rates from Galveston to points in Arkansas and Louisiana were higher than they were from New Orleans. At that time we were unable to market any of our bagging in Arkansas and Louisiana against the New Orleans competition." (Record 2040.)

H. C. Eargle for the Beaumont Chamber of Commerce tied up the general interests of the port with the cargo necessary to get steamship space:

> "As to giving an illustration of injury to Texas ports interests by equalization, we can start with the bootblack and go on to the ship chandler and every other man that participates in any degree from the coming of steamships into the port and the spending of a steamship's money at the port. I do not know whether he has suffered, but every big steamship that docks at one of these Texas ports or any (fol. 3245) other port, spends anywhere from three to five thousand dollars on every voyage every time it berths. That three to five thousand dollars gets into somebody's hands, and I know that money goes into circulation and is spent largely in the port where the money is put out. Although the rates are the same the steamships do not use any port because there is no incentive for a steamship line to change its base of operations from New Orleans to a Texas port so long as it can get its cargo either for export or bring it in for import on a parity of rates, and so long as the service has been established at the long-established port of New Orleans. If we had lower rates to Texas, there would be more business moving through the port and the port would prosper by having vessels coming to get the tonnage." (Record 2067)

J. T. Stockton, representing Houston Compress Company, warehousemen and forwarding agents for the Southern Bag & Burlap Company, gave the following testimony:

> "I am connected with the Houston Compress Company at Houston, Texas. We act as warehousemen and forwarding agents for the Southern Bag & Burlap Company. Service in that direction is performed directly under my supervision. The Southern Bag & Burlap Company are manufacturers of new bags, cotton-bale covering, and a bagging and tie business in general. They handle import bagging and ties. The

plant is on the Houston Ship Channel, on property leased from the Houston Compress Company. Some of their shipments come in over the wharves allotted (fol. 3289) to the Houston Compress Company, and some over the municipal piers. They get new bagging, in the form of burlap, from India, and some shipments from wholesalers of burlap who store burlap in New Orleans. Cotton bale covering, in the new form, and Dundee patches from Bush & Witherspoon, at Dundee, Scotland, or in the shape of second-hand cotton bale covering from practically every cotton receiving port in Europe and the Far East. Cotton ties from the Barrow-Hematite Company Barrow, Inverness, England. They make carload shipments of these commodities out of Houston, covering principally Texas and Oklahoma. They have very few shipments from Houston to other states—small as compared to their other business. They make a few shipments into Arkansas, but none, so far, to Louisiana. * * * As to finding it necessary to handle a large proportion of their bagging through New Orleans, if we intend to compete with other suppliers of a similar product, we are going to be forced to either build or rent facilities at New Orleans in order to get into that territory with our bagging and ties. We have imported bagging at New Orleans and shipped it by rail to Houston and manufactured it at least 25 times this year. I refer to the Houston Compress Company's fiscal year. The Burlap Company operates on the same season as the Houston Compress." (Record 2095-7)

Frank Kell, grain and flour exporter and miller, with a large interest in the Texas Star Flour Mills at Galveston, as well as at numerous other points testified in favor of the Texas ports complaint. (Record 2150) His testimony also emphasized the importance of the blending privilege at the ports. (Record 2151, 2172)

The numerous services performed by the port elevators on grain are shown in the testimony of W. Scott Hammond. (Record 2941-2956.) These include inspection, weighing, mixing, conditioning, cleaning, scouring and clipping.

APPENDIX 2.

Evidence Showing Inequality and Variability of Water Rates.

Hon. Huey P. Long, then Chairman of the Louisiana Public Service Commission, whose testimony herein eloquently portrays the advantages of the Port of New Orleans, emphasizes the importance of the tramp steamer in the making of rates:

"* * * In the final analysis, there are a great many rates that are dependent upon the tramp steamer traffic. By 'tramp steamer,' I mean a ship which has no particular routing. It is available for hire for whoever wants to hire it. As an example, we will say that the Steele Steamship Line today might have tonnage for the West Indies. They would be wanting to look for a tramp steamer. Any shipper who did not have a ship of its own, wherever it had cargo, it would hire a steamer, and that tramp steamer would be available to carry it to the West Indies, or any place it would have cargo to move. Now, tramp steamers can come to New Orleans. Tramp steamers can come to New Orleans for two reasons. First, there is a large territory for export traffic; and second, there is a large territory for (fol. 1384) import traffic. A tramp steamer can sail into the Port of New Orleans feeling that there is a reasonable chance to receive cargo moving either way. It cannot go into Galveston with any such expectation, or with any reliable assurance that it is going to obtain there either inbound or outbound cargo, and I firmly believe that the tramp steamer is one of the greatest rate regulating factors that we have in this country." (R. 872)

"The tramp steamer service at New Orleans is a great service. It is really the rate regulating factor of all service. The tramp steamer is, after all, the most potent factor in foreign commerce that we really have, outside of these regular lines, and for this reason: They might, for instance, sail between Mexico City and Brazil, or else between Brazil and Spain and

never come to the United States. They are available for hire. I might say, it is kind of like floating labor. They don't belong to the Union." (Record 876)

"* * * Therefore you find tramp steamers here in New Orleans ready to be hired and to be sent wherever there might be cargo available. It is possible for tramp steamers to make lower rates than the regular lines make. I do not doubt but that they act as a great factor in the reduction of rates." (R. 877)

"* * * Beyond question in my judgment Galveston could not get as favorable a bidding for traffic from these return boats and tramp boats as New Orleans because they did not have as many of them and because there was not as much general offering * * *." (R. 878)

"Galveston cannot get just as cheap service as New Orleans because Galveston has not got anything moving in there, and never did have. They don't attract the tramp boat regular, irregular or direct or anything else." (Record 879)

Witness Huston of the Wichita Board of Trade testified that:

"Most of the grain is exported to Europe; I could not say to any particular European country. *It goes mostly in tramp steamers as I understand.*" (Record 423)

Witness Pedrick, president of the Gulf Shipping Conference, Inc., testified:

"The level of rates, I think it might be interesting to show, are really not made by the Conference. The Conference fixes rates and issues tariffs to its members, but there are always some outsiders waiting for an opportunity to slip in and compete. The moment the Conference puts the rates up to a level where they are profitable, and attractive to an outsider, you wake up one morning and you find the outsider on your berth cutting the rate just enough to get a nucleus of a cargo. From the agents' standpoint, that is (fol. 2225)

probably a good thing, because it prevents our Conference members from doing anything unreasonable, but it is an absolute fact that if we had 99 per cent Conference members, we cannot make rates that are unreasonably high, because there are always steamship agents and brokers, who, by sending a cable, can get somebody to send in a ship on a week's notice, and take the cargo over at a little less than the Conference rates." (Record 1421-22)

"*In fact, wheat, as a rule, is left open, so that any Conference member can make his own rate. Any Conference member would be in a position, at will, to make any rate that he might choose to make, on wheat, to either a United Kingdom, Continental or Mediterranean port, until such time as the Conference might withdraw it from the open list.* He could make a rate which would absorb any differential that might be placed on the rail haul to the port, as long as it is open.

"By open I mean that at times the Conference authorizes members to quote such rates as they may please on certain commodities without reference to the tariff, for a limited period of time. That is known as throwing the rate open. That is, without regard to what anybody else does from Gulf ports, for instance, if he is operating from and to Gulf ports." (Record 1420-30)

"Q. As to emergency, would you call a tramp steamer's competition sufficient emergency to have that Committee function so as to reduce the Conference rate on wheat, as (fol. 2239) an illustration, to meet the tramp steamer's rate?

A. Well, as I said, that would be already open.

Q. Take any other commodity?

A. Any other commodity, the Committee would decide whether—the Conference would decide whether those were really competitive or not, and then the Rate Committee would be authorized to function on this limited number of commodities as long as that competition continued.

My answer to your question with respect to whether or not a tramp steamer's competition is sufficient for the Committee to function, with power to reduce our

Conference rate, is yes, usually. I will modify that because in some cases a tramp steamer may come in only to take a part cargo here, and is going elsewhere, and it is to prevent any subterfuge of the steamer having to take cargo away from another port.

The Conference does not function on the inward cargo. We have a separate Conference in Brazil that fixes the coffee rate. But that functions in Brazil, and not here.

"There is no Conference that controls the import rate from the Continent and Mediterranean ports. I am not quite sure about Great Britain.

As to the m.. ement of steamships from those ports to the Gulf, there is nothing that controls the curbing of the rate at will of the particular line that might be interested.

We come in competition quite frequently with tramp (fol. 2240) steamers. Tramp steamers play a rather important part when cargo is scarce to European ports, in connection with the making of ocean rates from Gulf ports to all of the foreign and South American destinations which I have discussed in my direct testimony. They affect us somewhat to South American ports, but not to the same degree. At times you can ignore tramp competition, if cargo is moving very freely, and let him fill up his ship a little below the Conference, but when there is not enough cargo to go around for the regular lines and when the tramp begins cutting the rates in order to fill his ship, the regular line must get down to the point where they must meet that competition with the tramp. The tramp steamers are very much an appreciable factor at the present time at New Orleans." (R. 1431-32)

"On import business there is no conference rate from the (fol. 2245) Continent. There is a Conference rate from the United Kingdom to the North Atlantic ports, but I am not sure whether the Gulf rates are influenced by that or not. I don't operate in that particular trade and cannot answer that positively. There is no Conference from the Mediterranean. Anybody can handle import burlap bagging, cotton bale covering, cotton bale ties and buckles at any rate the steamship may desire." (R. 1434)

"Nominally, the level of the ocean rates is fixed by the Conference, but practically it is the supply and demand of tonnage that fixes the rates, because, as I said in my direct testimony, if the Conference fixes the level too high, owners who have boats available will put them on at rates just a little under the Conference rates, and the Conference rates will have to go down." (Record 1435)

"Ordinarily, foreign vessels which are not members of the Conference, charge lower rates in many instances, than the Conference rate, in order to get the cargo from Conference lines. We have such foreign vessels carrying lower rates into and out of New Orleans." (Record 1436)

"I would not say that the location of New Orleans nearer (fol. 2258) to the Atlantic, as compared with the Texas ports, would work to the advantage of New Orleans, in that there would be a saving in the cost of operation of the ships to the major destinations to which the ships go, because coming up the river to a certain extent offsets that. The distance from New Orleans to the mouth of the river is between 30 and 100 miles. The distance from the mouth of the river to Galveston is about 240 miles, I think. I should say that the distance from New Orleans to the point where the boats from Galveston would meet would be about 115 or 120 miles. It might be approximately 125 miles nearer New Orleans to that common meeting point than from Galveston, but, of course, as I say, in securing freight rates we never take into consideration a small variation like that. That could not be represented in a freight rate at all (fol. 2259), I mean an ocean freight rate." (R. 1443).

The importance of the tramp steamer in determining ocean rates is also portrayed in the testimony of Witness Thornton:

"Adding together the rail rate to the port and the steamship rate beyond, and with the exception of the tramp steamers which operate out of both ports, the total through charge today is not the same in all cases. As an exception, quite often New Orleans offers a lot

of distress room more often than at Galveston because of the tramp steamers. When the tramp steamers break the rate at New Orleans the regular liners will meet that rate. It is the same at Galveston except that we do not have the tramp competition at Galveston that they do at New Orleans. Leaving out of consideration the tramps, the aggregate charge is not the same to every destination point coastwise or foreign through Galveston as through New Orleans to the same interior points.'' (Record 1873)